Supreme Court, U.S.
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No. 04-952

In The
Supreme Court of the United States

CHOLLA READY MIX, INC.,

Petitioner,

v.

VICTOR MENDEZ, Secretary of the Arizona Department of Transportation (ADOT); JEFF SWAN, ADOT Holbrook District Engineer; WILLIAM BELT, ADOT Environmental Planning Services Department; THOR ANDERSON, ADOT Official; RICHARD DUARTE, ADOT Environmental Planning Section Manager; BETTINA ROSENBERG, ADOT Historic Preservation Coordinator; JAMES GARRISON, Arizona State Historic Preservation Officer; and ROBERT GASSER, Arizona Parks Department Compliance Officer,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

WILLIAM PERRY PENDLEY*
**Counsel of Record*
CHRISTOPHER T. MASSEY
MOUNTAIN STATES
LEGAL FOUNDATION
2596 South Lewis Way
Lakewood, Colorado 80227
(303) 292-2021
Attorneys for Petitioner

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTIONS PRESENTED

1. Whether a decision by state officials to bar a landowner from using his private property because some American Indians assert that the land is "sacred" violates the Establishment Clause notwithstanding claims by state officials that the "sacredness" of the land is historically and culturally important to those Indians?

2. Whether a complaint alleging an Establishment Clause violation, which satisfies notice pleading, may be dismissed for not alleging facts sufficient to establish a *prima facie* case under *Lemon v. Kurtzman*, 403 U.S. 602 (1971), given the holding of this Court in *Swierkiewicz v. Sorema*, 534 U.S. 506 (2002)?

RULES 14.1(b) AND 29.6 STATEMENT

Petitioner, Cholla Ready Mix, Inc., has never issued shares to the public. It does not have a parent corporation, nor is there any publicly-held company that owns ten percent or more of its stock.

Respondents include: Victor Mendez, Secretary of the Arizona Department of Transportation ("ADOT"); Jeff Swan, ADOT Holbrook District Engineer; William Belt, ADOT Environmental Planning Services Department; Thor Anderson, ADOT Official; Richard Duarte, ADOT Environmental Planning Section Manager; Bettina Rosenberg, ADOT Historic Preservation Coordinator; James Garrison, Arizona State Historic Preservation Officer; and Robert Gasser, Arizona Parks Department Compliance Officer.

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PETITION FOR A WRIT OF CERTIORARI

Cholla Ready Mix, Inc. respectfully petitions this Court for a *writ* of *certiorari* to review the judgment of the United States Court of Appeals for the Ninth Circuit.

OPINIONS BELOW

The opinion of the Ninth Circuit (App., *infra*, 1-15) from which review is sought is reported at 382 F.3d 969 (9th Cir. 2004). The opinion of the District Court (App., *infra*, 16-19) is unreported.

STATEMENT OF JURISDICTION

The judgment of the Ninth Circuit was entered on September 1, 2004. A timely petition for rehearing *en banc* was denied on October 14, 2004 (App., *infra*, 23-24). The jurisdiction of this Court is invoked under 28 U.S.C. §1254. Jurisdiction in the District Court was based on 28 U.S.C. §1331. Jurisdiction before the Ninth Circuit was based on 28 U.S.C. §1291.

CONSTITUTIONAL AND REGULATORY PROVISIONS INVOLVED

The Establishment Clause of the First Amendment to the United States Constitution, which is applicable to the States through the Fourteenth Amendment, provides in pertinent part: "Congress shall make no law respecting an establishment of religion. . . ." U.S. Const. amend. I.

The relevant provisions of the 2000 Arizona Department of Transportation Standard Specifications for Road and Bridge Construction are reproduced at App., *infra*, 26-48.

STATEMENT OF THE CASE

Woodruff Butte is private property owned by Petitioner, Cholla Ready Mix, Inc. ("Cholla"), located south east of Holbrook, Arizona. App., *infra*, 56. Cholla is owned by Dale McKinnon and his family, which first leased and then purchased Woodruff Butte to mine the unique and valuable aggregate found there. App., *infra*, 56.

In 1990, the Hopi, Zuni, and Navajo Indian tribes (collectively, "Tribes") passed resolutions against the mining of Woodruff Butte because they considered it to be a place of religious significance or "sacred." App., *infra*, 57. In or around 1990, the Arizona State Historic Preservation Officer declared Woodruff Butte eligible for listing on the National Registry of Historic Places ("NRHP") over the objections of Mr. McKinnon. Woodruff Butte has yet to be listed on the NRHP. App., *infra*, 57.

In June 1991, the Arizona Department of Transportation ("ADOT") granted Cholla a commercial source number allowing aggregate mined from Woodruff Butte to be used in state highway projects. App., *infra*, 57. Nonetheless, beginning in 1992, ADOT officials began adopting strategies to discourage potential purchasers of aggregate from using Woodruff Butte because of its purported religious significance to the Tribes. App., *infra*, 59-63. These strategies culminated in 1999 when ADOT promulgated new commercial source regulations, under which all existing

commercial source numbers, including that of Cholla, would expire at the end of that year. App., *infra*, 65. Thereafter, commercial source numbers could be obtained only if the applicant submitted an environmental assessment that considered the potential impacts of mining to locations eligible for listing on the NRHP; only Woodruff Butte met this description. App., *infra*, 65.

On June 26, 2000, as a result of ADOT's new regulations and policy against the mining of Woodruff Butte, ADOT denied Cholla's application for a new commercial source number for Woodruff Butte despite Woodruff Butte's previous status as an approved aggregate source site. App., *infra*, 67. The rejection of Cholla's commercial source number application by ADOT was premised solely on the purported religious significance of Woodruff Butte to the Tribes. App., *infra*, 67-69.

On June 25, 2002, Cholla filed suit alleging that these actions and the policy against the mining of Woodruff Butte, as applied, violated Cholla's rights under the Establishment Clause, federal civil rights laws, and the Arizona Constitution.[1] On September 30, 2002, Arizona officials ("Respondents") filed a Motion to Dismiss pursuant to Federal Rule of Civil Procedure 12(b)(6). Cholla subsequently filed a motion for leave to amend its Original Complaint. Cholla's First Amended Complaint alleged more fully the injuries it has suffered, including violation of its rights under the

[1] Cholla sued state and federal officials, but the federal defendants were dismissed by joint stipulation of the parties; the state officials are the only remaining defendants in the case. For purposes of this petition, Cholla seeks review only of the dismissal of its allegations and claim for relief under the U.S. Constitution's Establishment Clause. *See,* App., *infra*, 68-69.

Establishment Clause. App., *infra*, 49-82. On January 17, 2003, the District Court granted Cholla's Motion for Leave to File a First Amended Complaint; nonetheless, in the same Order, the District Court granted Respondents' Motion to Dismiss. App., *infra*, 16-19.

On February 3, 2003, Cholla filed a Motion for Reconsideration, which included an alternative request for certification of final judgment pursuant to Federal Rule of Civil Procedure 54(b). On February 21, 2003, the District Court denied Cholla's Motion for Reconsideration but granted Cholla's request for certification of final judgment against Respondents. App., *infra*, 20-21. On March 7, 2003, Cholla timely filed its Notice of Appeal with the Ninth Circuit.

On September 1, 2004, the Ninth Circuit affirmed the dismissal of Cholla's Complaint and its Establishment Clause claim, App., *infra*, 1-15, holding that "no evidence could bolster Cholla's Establishment Clause claim because it is premised on flawed analysis of the governing law." App., *infra*, 8. The Ninth Circuit described that "governing law" as providing that "the Establishment Clause does not bar the government from protecting an historically and culturally important site simply because the site's importance derives at least in part from its sacredness to certain groups." App., *infra*, 13.

In addition, although the Ninth Circuit, in determining whether the District Court had erred in granting Respondents' Rule 12(b)(6) motion, was required to assume the truth of the allegations in Cholla's Complaint and to construe those allegations liberally, the Ninth Circuit evaluated the strength of Cholla's Establishment Clause claim. In so doing, the Ninth Circuit held that Cholla's

Complaint was deficient because Cholla had failed to set forth a *prima facie* case for an Establishment Clause claim under *Lemon v. Kurtzman*, 403 U.S. 602 (1971); for example, Cholla had not alleged that Arizona officials were not motivated by a secular purpose. App., *infra*, 9.

Finally, the Ninth Circuit addressed the merits of Cholla's Establishment Clause claim. To do so however, given the stage of the proceedings, that is, prior to discovery and the completion of a factual record, the Ninth Circuit assumed facts not in evidence. For example, although Cholla alleged that Woodruff Butte is private property to which no American Indians have access, App., *infra*, 56, the Ninth Circuit held that Respondents were motivated by a desire to "avoid interference with a group's religious programs" or to "accommodate [a] religious minority to let them [*sic*] practice their religion without penalty." App., *infra*, 9.

REASONS FOR GRANTING THE PETITION

I. THE NINTH CIRCUIT'S HOLDING CONFLICTS WITH THE ESTABLISHMENT CLAUSE JURISPRUDENCE OF THIS COURT AND THE OTHER CIRCUITS.

Notwithstanding that the matter before it came pursuant to a Rule 12(b)(6) motion to dismiss and that no discovery or fact finding had been conducted, the Ninth Circuit issued the following broad legal holding on the merits:

> In conclusion, the Establishment Clause does not bar the government from protecting an historically and culturally important site simply because

> the site's importance derives at least in part from its sacredness to certain groups.

App., *infra*, 13. The Ninth Circuit cites no authority for this broad holding, which conflicts with the holdings of this Court, the Ninth Circuit, and other Circuits.

A. The Ninth Circuit's Holding Ignores the Test Set Forth by this Court in *Lemon v. Kurtzman*.

In *Lemon v. Kurtzman*, 403 U.S. 602, 612-13 (1971), this Court held that government action does not offend the Establishment Clause if it: (1) has a secular purpose; (2) does not have the principal or primary effect of advancing or inhibiting religion; and (3) does not foster an excessive entanglement with religion.

1. The Ninth Circuit's Holding Conflicts Regarding "Secular Purpose."

The Ninth Circuit's holding that a "secular purpose" is served when governments seek to accommodate groups' religion practices, App., *infra*, 9, ignores the requirement that the accommodation doctrine does not come into play unless and until some action, by government, has barred the practice of religion and the government accommodates religion by removing that bar. *See, Lee v. Weisman*, 505 U.S. 577, 607 (1992) (scope of accommodation permissible under the Establishment Clause requires the lifting of a discernible burden on the free exercise of religion); *Allegheny County v. Greater Pittsburgh ACLU*, 492 U.S. 573, 601 n. 51, 59 (1989) (government efforts to accommodate religion are constitutional only if they "remove burdens on the free exercise of religion").

Moreover, the Ninth Circuit cites no legal precedent holding that a "secular purpose" is served when governments bar people from using their private property "to accommodate" (or to avoid interference with) religious groups. App., *infra*, 9. The accommodation doctrine provides no such authority.

2. The Ninth Circuit's Holding Conflicts Regarding "Primary Effect."

The Ninth Circuit's claim that "the central role of religion in human societies" supports its holding that the Establishment Clause does not bar Respondents' prohibition against Cholla's use of its property contains not a single legal precedent; instead, the Ninth Circuit waxes eloquent about religious sites that are also historic. App., *infra*, 10.

Not surprisingly, given the controversial nature of Establishment Clause jurisprudence, "the central role of religion in human societies" has not prevented this Court, the Ninth Circuit, and other federal circuits from holding that government often improperly abandons its neutrality regarding religion. *See, Board of Educ. of Kiryas Joel Village School Dist. v. Grumet*, 512 U.S. 687, 696 (1994) (finding that the Establishment Clause "compels the State to pursue a course of 'neutrality' toward religion, favoring neither one religion over others nor religious adherents collectively over nonadherents"); *Prince v. Jacoby*, 303 F.3d 1074, 1092 (9th Cir. 2002) ("a significant factor in evaluating whether a governmental program violates the Establishment Clause is its neutrality toward religion"); *U.S. v. Carroll*, 567 F.2d 955, 957 (10th Cir. 1977) (Establishment

Clause "insures governmental neutrality in religious matters").

Moreover, the Ninth Circuit's determination that Establishment Clause complainants, in order to maintain their constitutional challenge to government action, must assert that the government refuses to advance their religion is totally without merit. App., *infra*, 11. Advancement of any religion, not the advancement of some religions and not of others, is the gravamen of an Establishment Clause violation. *See, Board of Educ. of Kiryas Joel Village School Dist.*, 512 U.S. at 696.

Finally, the Ninth Circuit cites no case, because none exists, holding that a government does not violate the Establishment Clause when it bars a person from using his private property because others consider his land "sacred." App., *infra*, 8-13.

3. The Ninth Circuit's Holding Conflicts Regarding "Excessive Entanglement."

The Ninth Circuit's holding that Respondents' actions on behalf of the Tribes in barring Cholla's use of its private property was a "routine administrative contact[]" does not find support in the cases upon which the Ninth Circuit relied. App., *infra*, 12. In fact, the lead role of the Indians in Respondents' actions against Cholla constitutes the "excessive entanglement" against which this Court has ruled. *See, Lyng v. Northwest Indian Cemetery Protective Ass'n*, 485 U.S. 439, 451-52 (1988) (demands for privacy in a National Forest considered sacred by Indians cannot justify the government's closure of public lands, even temporarily); *see also, Badoni v. Higginson*, 638 F.2d 172, 179 (10th Cir. 1980) ("Issuance of regulations to exclude

tourists completely . . . for the [] purpose of aiding [Indians'] conduct of religious ceremonies would seem a clear violation of the Establishment Clause").

Moreover, the Ninth Circuit's assertion as to the types of allegations that must be made to show "excessive entanglement," App., *infra*, 13, finds no support in Establishment Clause jurisprudence. *See, Lynch v. Donnelly,* 465 U.S. 668, 691 (1984) ("what is crucial is that a government practice not have the effect of communicating a message of government endorsement or disapproval of religion").

B. The Ninth Circuit's Holding Contains None of the Analysis Required by this Court and the Circuits if Challenged Religious Symbols Contain Historical and Cultural Features.

1. The Mere Presence of Historical or Cultural Features Does Not Automatically Render the Display of a Religious Symbol Constitutional.

This Court's Establishment Clause analysis asks whether the government has "demonstrate[d] a preference for one particular sect or creed []" that may reasonably be perceived as governmental endorsement of religion, *Allegheny County*, 492 U.S. at 605; *see also, Lynch*, 465 U.S. at 687 (O'Connor, J., concurring), because the Establishment Clause "prohibits government from appearing to take a position on questions of religious belief. . . ." *Allegheny County*, 492 U.S. at 593-94. This Court applies this analysis even when the religious symbols in question have historical or cultural features.

For example, in *Allegheny County*, this Court held that a crèche, which was topped with an angel bearing a banner proclaiming "Gloria in Excelsis Deo!", violated the Establishment Clause because the display could be seen as a governmental observance of Christmas "as a Christian holy day." *Id.* 601. Thus, despite the crèche's historical and cultural significance in the Christian religion, its display by the county was unconstitutional. *Id.* at 598.

In another example, the Ninth Circuit held that, although a cross may have historical and cultural significance as a war memorial and, thus, a purportedly secular purpose, observers might reasonably perceive a governmental display of such a religious symbol on public property as government endorsement of the Christian faith. *See, Buono v. Norton*, 371 F.3d 543 (9th Cir. 2004) (presence of cross designated as a war memorial in a national preserve violated the Establishment Clause); *Separation of Church and State Committee v. City of Eugene*, 93 F.3d 617 (9th Cir. 1996) (Latin cross in a city park that was a memorial in honor of veterans violated Establishment Clause). In both *Buono* and *Separation of Church and State Committee*, the Ninth Circuit held that, despite the historical and cultural significance of the symbols as war memorials, the display of these symbols violated the Establishment Clause under *Lemon* and *Alleghany* because a person could reasonably perceive the governments' display of the crosses as endorsement of religion. *See, Buono*, 371 F.3d at 550; *Separation of Church and State Committee*, 93 F.3d at 619-20.

The Ninth Circuit's ruling in *Cholla* that Respondents may bar Cholla from using its land because Cholla's land is both sacred and historically and culturally important to American Indians conflicts with the holding of this Court

in *Allegheny County*. This Court should grant this petition to resolve this conflict.

2. Two Cases Now Before this Court Present the Issue of Whether the Presence of Historical or Cultural Features in a Religious Symbol Save It from a Ruling that Its Display is Unconstitutional.

There are two cases whose petitions for *writ* of *certiorari* were granted that are now before this Court: *Van Orden v. Perry*, 351 F.3d 173 (5th Cir. 2003), *cert. granted*, 125 S.Ct. 310 (2004); and *ACLU of KY, et al. v. McCreary County, et al.*, 354 F.3d 438 (6th Cir. 2003), *cert. granted*, 125 S.Ct. 346 (2004).

Both cases speak to the very issue addressed by the Ninth Circuit in its broad ruling, that is, whether the mere presence of historical or cultural features in a religious display save it from a ruling that its display is unconstitutional.[2] App., *infra*, 13. For example, in *Van Orden*, the State of Texas argues that a monument that contains the Ten Commandments has historical significance and

[2] *Van Orden* and *McCreary County* ask whether the display, in a public place, of a monument that includes the Ten Commandments, which Jews and Christians believe were written in stone by God, constitutes government endorsement of religion. *Cholla* asks whether Respondents' endorsement of the religious beliefs of some American Indians that Woodruff Butte, a geological feature, is "sacred" is unconstitutional. Neither the monument in *Van Orden* or *McCreary County*, nor the geological feature in *Cholla* is, in and of itself, offensive to the Constitution. When a government, however, endorses the significance that religious adherents affix to either of those pieces of stone then that government has run afoul of the Establishment Clause. *See, Allegheny County*, 492 U.S. at 590-91.

therefore does not offend the Establishment Clause. *See, Van Orden*, 351 F.3d at 177. In *McCreary County*, three Kentucky counties argue that their display of the Ten Commandments serves a secular purpose because the Ten Commandments were: "part of the foundation of American Law and Government . . . [and] played a significant role in the foundation of our system of law and government[] and . . . in the development, origins or foundations of American or Kentucky law. . . ." *McCreary County*, 354 F.3d at 446-47.

Given that the question in *Cholla* is remarkably similar to that presented in *Van Orden* and *McCreary County*, this Court should hold *Cholla* aside until those cases are decided. At that time, *certiorari* should be granted in *Cholla* and it should be reversed and remanded to the Ninth Circuit with instructions to follow the rulings in *Van Orden* and *McCreary*.

II. THE NINTH CIRCUIT'S DECISION CONFLICTS WITH THIS COURT'S HOLDINGS IN *SWIERKIEWICZ v. SOREMA* AND *CONLEY v. GIBSON*.

A. Cholla's Establishment Clause Claim May Not be Held to a Heightened Pleading Standard.

1. This Court has Barred a Requirement that a Plaintiff Plead a *Prima Facie* Case.

In *Swierkiewicz v. Sorema*, 534 U.S. 506 (2002), this Court unanimously rejected any requirement that a plaintiff plead facts establishing a *prima facie* case, as required for a limited number of exceptions under Federal Rule of Civil Procedure 9(b), because that requirement

would substitute an "evidentiary standard [for] a pleading requirement." *Swierkiewicz*, 534 U.S. at 510.[3] Instead, federal courts should "rel[y] on liberal discovery rules and summary judgment motions to define disputed facts and issues and to dispose of unmeritorious claims." *Swierkiewicz*, 534 U.S. at 513. Furthermore, "[b]efore discovery has unearthed relevant facts and evidence, it may be difficult to define the precise formulation of the required *prima facie* case." *Id.* Finally, because a "*prima facie* case operates as a flexible evidentiary standard, it should not be transposed into a rigid pleading standard. . . ." *Id.*

Nonetheless, the Ninth Circuit ignored the holding of this Court in *Swierkiewicz* and held that Cholla's First Amended Complaint was inadequate because Cholla had failed to establish a *prima facie* Establishment Clause case under *Lemon*. App., *infra*, 8-13. For example, according to the Ninth Circuit: "Cholla has alleged no facts that would support a conclusion that [Respondents] were not motivated at least in part by [a] secular purpose[,]" App., *infra*, 9; "[t]here is no suggestion that [Respondents] favor tribal religion over other religions or that they would not protect sites of historical, cultural, and religious importance to other groups[,]" App., *infra*, 11; "Cholla has not alleged facts that would support an inference that [Respondents'] actions foster excessive government entanglement with religion[,]" App., *infra*, 12; and "Cholla does not allege that [Respondents] participate in the Tribe's religious practices, inquire about the substance of their

[3] Although *Swierkiewicz* addressed heightened pleading requirements in discrimination cases, it declared that "complaints in these cases, *as in most others*, must satisfy only the simple requirements of Rule 8(a)." *Swierkiewicz*, 534 U.S. at 513 (emphasis added).

religious views, or monitor their religious practices." App., *infra*, 13.

The *prima facie* case under *Lemon* that the Ninth Circuit demands Cholla allege, however, is an evidentiary standard, not a pleading requirement. This Court has never ruled that the requirements for establishing a *prima facie* Establishment Clause violation under *Lemon* also apply to the pleading standard that plaintiffs must satisfy in order to survive a Rule 12(b) motion to dismiss. Instead, this Court has held that heightened pleading standards conflict with Rule 8(a)(2), which provides that a complaint must only include "a short and plain statement of the claim showing that the pleader is entitled to relief." *Swierkiewicz*, 534 U.S. at 512.

In *Swierkiewicz*, this Court ruled that "Rule 8(a)'s simplified pleading standard applies to all actions, with limited exceptions." *Id.* at 513. The only notable exception lies in Rule 9(b), which provides for greater particularity in all pleadings of fraud or mistake. However, this Court has refused to extend such exceptions to other actions. *See, Leatherman v. Tarrant County Narcotics Intelligence & Coordination Unit*, 507 U.S. 163 (1993) (courts could not impose a heightened pleading standard on plaintiffs alleging § 1983 claims against municipalities); *Crawford-El v. Britton*, 523 U.S. 574 (1998) (courts should not establish heightened pleading standards regarding improper motive in constitutional tort cases brought against individual defendants). Just as Rule 9(b) makes no reference to claims of employment discrimination, municipal liability under § 1983, or improper motive in constitutional tort cases, neither does it mention an Establishment Clause claim. Thus, as in these cases "as in most others," Cholla "must satisfy only the simple requirements of Rule

8(a)" instead of pleading a *prima facie* Establishment Clause case. *See, Swierkiewicz*, 534 U.S. at 513.

2. An Establishment Clause Claim May Not Require Proof of All the Elements of *Lemon v. Kurtzman*.

This Court instructed in *Swierkiewicz* that "the precise requirements of a *prima facie* case can vary depending on the context and were never intended to be rigid, mechanized, or ritualistic." 534 U.S. at 512 (internal quotations omitted). This Court's Establishment Clause jurisprudence demonstrates the wisdom of *Swierkiewicz* since the *Lemon* framework does not apply in every Establishment Clause case.

For instance, if the nature of the religious activity is so pervasive as to conflict with settled Establishment Clause precedent, then a plaintiff may prevail without proving all of the elements of the *Lemon* test. *See, Lee*, 505 U.S. at 577 (striking down graduation prayer without applying *Lemon*); *Marsh v. Chambers*, 463 U.S. 783 (1983) (upholding legislative prayer in Establishment Clause challenge without applying *Lemon* because of the unique history of the practice); *Larson v. Valente*, 456 U.S. 228 (1982) (when a government statute or practice explicitly discriminates against a certain religious group, the *Lemon* test is not useful). Furthermore, this Court has employed variations of the *Lemon* test in cases involving government speech on religious topics. *See, Allegheny County*, 492 U.S. at 573 (applying endorsement test, which is refinement of second prong of *Lemon* test, in case involving religious symbols on government property); *Lynch*, 465 U.S. at 687, 694 (O'Connor, J., concurring) ("Every government practice must be judged in its unique circumstances to determine

whether it constitutes an endorsement or disapproval of religion.").

B. Cholla's Complaint Meets Notice Pleading Requirements as Defined by this Court's Holding in *Conley v. Gibson*.

Rule 8(a)(2) provides that a complaint must include only "a short and plain statement of the claim showing that the pleader is entitled to relief," which "give[s] the defendant fair notice of what the plaintiff's claim is and the grounds upon which it rests." *Conley v. Gibson*, 355 U.S. 41, 47 (1957). In its Complaint, Cholla satisfied the requirements of Rule 8(a)(2) by establishing that it is entitled to relief for its Establishment Clause claim and by putting Respondents on notice as to the nature and basis of Cholla's claim. For example, Cholla's Complaint alleges, in part:

> 88. Defendants maintain a policy against the use of Woodruff Butte as a materials source.
>
> 89. The reason for this policy is that Defendants believe Woodruff Butte is considered sacred by the Hopi, Zuni, and/or Navajo Indian Tribes based on religious grounds.
>
> 90. ADOT actively maintains a policy and has implemented this policy against use of Woodruff Butte by first promulgating, then subsequently enforcing the challenged regulations against Cholla.
>
> 91. The purpose of the challenged regulations, Defendants' policy, and the denial of Cholla's application for a commercial source number is not secular. It is in fact based on specific religious grounds.

> 92. The principle and/or primary effect of the challenged regulations, Defendants' policy, and the denial of Cholla's application for a commercial source number is the advancement and/or protection of religion.
>
> 93. The challenged regulations, Defendants' policy, and the denial of Cholla's application for a commercial source number foster an excessive governmental entanglement with religion.
>
> 94. The challenged regulations, Defendants' policy, and the denial of Cholla's application for a commercial source number, together and separately, constitute governmental endorsement of religion pursuant to the beliefs and practices of Hopi, Zuni, and/or Navajo Indian Tribes.
>
> 95. As a direct result of the challenged regulations and Defendants' formulation, implementation, and enforcement of their policy, Cholla is unable to bid for and/or win materials subcontracts for ADOT highway construction contracts. The effect of this direct result violates Cholla's rights against establishment of religion under the First Amendment to the United States Constitution.

App., *infra*, 68-69.

Nonetheless, the Ninth Circuit ignored the liberal notice pleading requirements defined by this Court in *Conley* and, instead, subjected Cholla's Complaint to a more rigid pleading standard. In so doing, the Ninth Circuit erroneously held that Cholla's Complaint was inadequate because Cholla had failed to allege a *prima facie* case under *Lemon*. *See, Swierkiewicz*, 534 U.S. at 512. For example, although Cholla alleged that Respondents' policy and

actions barring Cholla's use of its private property were "not secular" and, were "in fact based on specific religious grounds," App., *infra*, 68, the Ninth Circuit faulted Cholla for not speculating on what "secular purposes" Respondents might argue they had sought to serve and for not setting forth in its Complaint "facts that would support a conclusion that [Respondents] were not motivated at least in part by" secular purposes. App., *infra*, 9.

In another instance, although Cholla alleged that the purpose and primary effect of Respondents' actions was the "advancement" and "endorsement of religion pursuant to the beliefs and practices of [the] Tribes[,]" App., *infra*, 69, the Ninth Circuit held that Cholla's Complaint was incomplete because "there is no suggestion that [Respondents] favor tribal religion over other religions." App., *infra*, 10-11.

In a third example, although Cholla alleged that the "challenged regulations, [Respondents'] policy, and the denial of Cholla's application for a commercial source number foster an excessive governmental entanglement with religion," App., *infra*, 69, the Ninth Circuit held that Cholla should have plead "that [Respondents] participate in the Tribe's religious practices, inquire about the substance of their religious views, or monitor their religious practices." App., *infra*, 13.

Rule 8(a)(2) and this Court's holding in *Conley* were satisfied by Cholla's allegations and claim for relief under the Establishment Clause. Accepted as true, Cholla's allegations suggest a violation of the Establishment Clause under each part of the *Lemon* test. Cholla is not required, as the Ninth Circuit demands in this instance, to anticipate the "facts" that Respondents may allege in their

defense and allege facts that will refute Respondents' "facts." *Id.* Such a requirement of "greater specificity for particular claims is a result that must be obtained by the process of amending the Federal Rules, and not by judicial interpretation." *Swierkiewicz*, 534 U.S. at 515 (internal quotations omitted).

C. The Ninth Circuit Failed to Accept the Allegations of Cholla's Complaint as True and Instead Assumed Facts Not in Evidence.

In determining whether the District Court properly dismissed Cholla's Complaint pursuant to Respondents' Rule 12(b)(6) motion, the Ninth Circuit was required to accept as true all of the factual allegations contained in Cholla's Complaint. *See, Leatherman*, 507 U.S. at 164. Nonetheless, the Ninth Circuit not only attacked, rather than assume, the truth of Cholla's allegations, the Ninth Circuit also speculated as to facts that would result in a finding that Cholla's Complaint was without merit.[4]

1. The Ninth Circuit Assumed Facts Regarding a "Secular Purpose."

The Ninth Circuit held that Respondents had a "secular purpose" in barring Cholla's use of its private property, that is, to carry out "state construction projects in a manner that does not harm a site of religious, historical, and cultural importance to several Native American

[4] The Ninth Circuit held, for example, that Cholla's allegation, in its Complaint, that "[t]he principle and/or primary effect of [Respondents' actions] is the advancement and/or protection of religion," App., *infra*, 69, is without merit. App., *infra*, 10.

groups and the nation as a whole." App., *infra*, 9. That conclusion is based on what Respondents argued in their Motion to Dismiss. State Defendants' Motion to Dismiss at 10-13. Cholla alleged in its Complaint, however, that the sole reason for the bar on Cholla's use of its property was that Cholla's land is sacred to the Tribes. App., *infra*, 68. It is this allegation by Cholla that must be assumed to be true, not Respondents' arguments. *See, Leatherman*, 507 U.S. at 164.

Furthermore, the Ninth Circuit, citing *Kong v. Scully*, 341 F.3d 1132, 1140 (9th Cir. 2003), held that Respondents may have been motivated by a desire to "avoid interference with a group's religious programs," and, citing *Mayweathers v. Newland*, 314 F.3d 1062, 1068 (9th Cir. 2002), that Respondents may have been seeking the "[a]ccomodation of a religious minority to let them [*sic*] practice their religion without penalty." App., *infra*, 9. The Ninth Circuit reached this conclusion contrary to the facts alleged in Cholla's Complaint. For example, Woodruff Butte is private property; therefore, no one has access to Woodruff Butte to conduct a "religious program[]" or "to practice [] religion without penalty." App., *infra*, 56. Thus, these could not have been the "secular purposes" that motivated Respondents to bar Cholla from using its property.

2. The Ninth Circuit Assumed Facts Regarding "Primary Effect."

The Ninth Circuit, as part of its lengthy discourse on the "central role of religion in human societies," declared, "[t]he Establishment Clause does not require governments to ignore the historical value of religious sites." App., *infra*,

10. In so holding, the Ninth Circuit assumed that Cholla's private property has "historical value" and "historical significance" to some American Indians. App., *infra*, 10. Cholla's Complaint, however, alleges that the sole reason for Respondents' policy against the use of Woodruff Butte is the advancement and protection of the Tribes' religion. App., *infra*, 57, 66-69.

Furthermore, the Ninth Circuit, in holding that Respondents' actions do not advance religion, assumed that Respondents barred Cholla from using its private property in order not to "interfere with the Tribes' religious practices. . . ." App., *infra*, 11. No such fact was ever adjudicated. Yet, the one fact that is known because it was alleged in Cholla's Complaint – that Woodruff Butte is private property – demonstrates that "the Tribes' religious practices" could not have taken place there and, thus, would not be "interfere[d] with" by Cholla's use of its property.

3. The Ninth Circuit Assumed Facts as to "Excessive Entanglement."

Cholla alleged, in response to assertions by the Tribes that Woodruff Butte – Cholla's private property – is "sacred" to them, that Respondents did as the Tribes demanded, that is, Respondents barred Cholla from using its private property. App., *infra*, 54-55, 57, 64-65, 67. Cholla also alleged that Respondents' actions fostered excessive government entanglement with religion. App., *infra*, 69. Nonetheless, the Ninth Circuit ignored the facts in Cholla's well-pled Complaint and assumed that Cholla's only factual allegation was that "the Tribes were consulted." App., *infra*, 12.

Moreover, the Ninth Circuit assumed that the nature of the Tribes involved here was "pervasively sectarian" and hence, when Respondents did as the Tribes asked, Respondents were not excessively entangled with religion. App., *infra*, 12. The nature of the Tribes, as well as the nature of the demands they made in this case, require factual finding, not assumptions at this stage of the proceedings.

The Ninth Circuit's holding that Cholla must allege a *prima facie* Establishment Clause case under *Lemon* to survive a Rule 12(b)(6) motion to dismiss conflicts with this Court's Establishment Clause jurisprudence and its holdings in *Swierkiewicz* and *Conley*. Accordingly, this Court should grant the Petition to resolve these conflicts.

CONCLUSION

For the foregoing reasons, Cholla Ready Mix, Inc., respectfully requests that this Court grant this petition for a *writ* of *certiorari*.

Respectfully submitted,

WILLIAM PERRY PENDLEY, ESQ.*
**Counsel of Record*
CHRISTOPHER T. MASSEY, ESQ.
MOUNTAIN STATES
LEGAL FOUNDATION
2596 South Lewis Way
Lakewood, Colorado 80227
(303) 292-2021

Attorneys for Petitioner

Dated: January 12, 2005.

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FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

CHOLLA READY MIX, INC.,

Plaintiff-Appellant,

v.

WILLIAM CIVISH, BLM Safford, Arizona Field Office District Manager; VICTOR MENDEZ, Secretary of the Department of Transportation (ADOT); JEFF SWAN, ADOT Holbrook District Engineer; WILLIAM BELT, ADOT Environmental Planning Services Department; THOR ANDERSON, ADOT Official; RICHARD DUARTE, ADOT Environmental Planning Section Manager; BETTINA ROSENBERG, ADOT Historic Preservation Coordinator; JAMES GARRISON, Arizona State Historic Preservation Officer; ROBERT GASSER, Arizona Parks Department Compliance Officer,

Defendants-Appellees.

No. 03-15423

D.C. No.
CV-02-01185-FJM

OPINION

Appeal from the United States District Court
for the District of Arizona
Frederick J. Martone, District Judge, Presiding

Argued and Submitted
May 12, 2004 – San Francisco, California

App. 2

Filed September 1, 2004

Before: Betty B. Fletcher, Stephen S. Trott, and Raymond C. Fisher, Circuit Judges.

Opinion by Judge Betty B. Fletcher

COUNSEL

William Perry Pendley, Christopher T. Masey [sic], Mountain States Legal Foundation, Lakewood, CO, for the plaintiff-appellant.

James N. Smith, Jr., Joe Acosta, Jr., Assistant Attorneys General, Phoenix, AZ, for the defendants-appellees.

OPINION

B. FLETCHER, Circuit Judge:

Cholla Ready Mix, Inc. ("Cholla") appeals the district court's dismissal of its complaint alleging that Arizona state officials' policy against using materials mined from Woodruff Butte in state construction projects violates its rights under the Establishment Clause, 42 U.S.C. §§ 1981, 1983, and 2000d, and the Arizona Constitution. We have jurisdiction under 28 U.S.C. § 1291, and we affirm.

I. BACKGROUND

Dale McKinnon, who is Cholla's sole shareholder, and his family own a portion of Woodruff Butte.[1] In 1990, the

[1] The background is drawn primarily from the complaint, because the court considers the facts alleged therein to be true for the purposes of reviewing a dismissal pursuant to Fed. R. Civ. P. 12(b)(6).

McKinnon family leased part of Woodruff Butte and began mining it for aggregate materials used primarily for road construction. Shortly after mining operations began, the Hopi Tribe, Zuni Pueblo, and Navajo Nation (collectively, "the Tribes") passed resolutions against the mining because of Woodruff Butte's religious, cultural, and historical significance to these groups. In June 1991, the Arizona Department of Transportation (ADOT) granted a commercial source number allowing materials mined from the Butte to be used in state highway construction projects. In September 1991, the McKinnons bought the mined portion of Woodruff Butte.

The mining of Woodruff Butte led to a variety of disputes and litigation involving the Tribes, Cholla, construction contractors, and various Arizona and federal officials and agencies. In response, ADOT adopted strategies to discourage the use of materials from Woodruff Butte in state construction projects. In 1999, ADOT promulgated new commercial source regulations, which require each applicant for a commercial source number to submit an environmental assessment (EA) that considers, *inter alia,* adverse effects on places eligible for listing on the National Register of Historic Places (NRHP). Woodruff Butte was declared eligible for listing on the NRHP in or around 1990. On June 26, 2000, ADOT denied Cholla's application for a new commercial source number because of the projected adverse effects on historic property on Woodruff Butte. Without a commercial source number, Cholla cannot provide aggregate materials for state highway construction projects, but Cholla remains free to sell its materials in the private market.

On June 25, 2002, Cholla filed suit in district court against various government[2] officials alleging that the policy against using materials from the Butte in state construction projects violates Cholla's rights under the Establishment Clause, federal civil rights laws, and the Arizona Constitution. The district court granted Cholla's motion for leave to file an amended complaint, but then granted the state defendants' motion to dismiss. After the district court denied Cholla's motion for reconsideration and granted its request for certification of final judgment against the state defendants, Cholla timely filed a notice of appeal to this court.

II. STANDARD OF REVIEW

The court reviews de novo dismissals on the basis of Eleventh Amendment immunity. *Lovell v. Chandler,* 303 F.3d 1039, 1050 (9th Cir. 2002). We also review de novo dismissals on the basis of a statute of limitations. *Mann v. Am. Airlines,* 324 F.3d 1088, 1090 (9th Cir. 2003). Likewise, we review de novo dismissals for failure to state a claim under Fed. R. Civ. P. 12(b)(6), accepting all facts alleged in the complaint as true and construing them in the light most favorable to the plaintiff. *Karam v. City of Burbank,* 352 F.3d 1188, 1192 (9th Cir. 2003). "However, the court is not required to accept legal conclusions cast in the form of factual allegations if those conclusions cannot reasonably be drawn from the facts alleged." *Clegg v. Cult Awareness Network,* 18 F.3d 752, 754-55 (9th Cir. 1994). "Nor is the court required to accept as true allegations

[2] Cholla sued state and federal officials, but the federal defendants were dismissed by the parties' joint stipulation, and the state officials are the only remaining defendants in the case.

that are merely conclusory, unwarranted deductions of fact, or unreasonable inferences." *Sprewell v. Golden State Warriors,* 266 F.3d 979, 988 (9th Cir. 2001).

III. DISCUSSION

A. *Eleventh Amendment Immunity*

Cholla appeals the district court's holdings that the Eleventh Amendment bars its state law claims and its claim for damages under Title VI, 42 U.S.C. § 2000d.[3]

1. Damages under Title VI

Congress abrogated state immunity from damages under Title VI. *See* 42 U.S.C. § 2000d-7(a); *Alexander v. Sandoval,* 532 U.S. 275, 280 (2001); *Miranda B. v. Kitzhaber,* 328 F.3d 1181, 1188-89 (9th Cir. 2003). Although we affirm on other grounds, we conclude that the district court erred by holding that the Eleventh Amendment bars Cholla's claims for damages under § 2000d.

2. State Law Claims

As the district court held, all of Cholla's state law claims are barred by the Eleventh Amendment, which precludes the adjudication of pendent state law claims against nonconsenting state defendants in federal courts. *See Pennhurst State Sch. & Hosp. v. Halderman,* 465 U.S. 89, 106 (1984); *Raygor v. Regents of Univ. of Minn.,* 534

[3] Cholla has waived any challenge to the district court's holding that the Eleventh Amendment bars its request for damages under § 1981.

U.S. 533, 540-541 (2002); *Ashker v. Cal. Dep't of Corr.*, 112 F.3d 392, 394 (9th Cir. 1997).[4]

Cholla's reliance on *Piatt v. MacDougall*, 773 F.2d 1032 (9th Cir. 1985) to revive its state law claims as a substantive part of its § 1983 claim is misplaced. *Piatt* held that where a state statute provides prisoners a right to compensation for their work, they can bring a § 1983 claim alleging that the state revoked their right to pay without due process. *Id.* at 1035-37. *Piatt* recognizes that, because a due process claim necessarily fails if the plaintiff has no property interest in the relevant property, a federal due process claim may succeed or fail depending on whether the § 1983 plaintiff has a cognizable property interest under state law. *Id.* at 1035. However, *Piatt* does not permit plaintiffs to sue in federal court under § 1983 solely for violations of state law. Thus, *Piatt* is of no help to Cholla.

B. *Statutes of Limitations*

The statutes providing Cholla's federal causes of action, 42 U.S.C. §§ 1981, 1983, and 2000d, do not contain their own statutes of limitations, so courts borrow the most appropriate state statute of limitations. *See Wilson v. Garcia*, 471 U.S. 261, 268 (1985). For these claims, we borrow Arizona's statute of limitations for personal injury claims. *See Wilson*, 471 U.S. at 276-80 (holding that the statute of limitations for personal injury claims applies in

[4] We have recognized an exception to *Pennhurst* where the state official is sued in a personal capacity. *See, e.g., Ashker*, 112 F.3d at 394-95. All defendants in this case were sued in their official capacities, so this exception does not apply.

§ 1983 suits); *Addisu v. Fred Meyer, Inc.*, 198 F.3d 1130, 1140 (9th Cir. 2000) (§ 1981 claims) (citing *Goodman v. Lukens Steel Co.*, 482 U.S. 656, 661-62 (1987)); *Taylor v. Regents of Univ. of Cal.*, 993 F.2d 710, 711-12 (9th Cir. 1993) (§ 2000d claims).[5] The applicable statute of limitations for personal injury claims in Arizona is two years. *See* Ariz. Rev. Stat. § 12-542; *TwoRivers v. Lewis*, 174 F.3d 987, 991 (9th Cir. 1999). Thus, the district court correctly concluded that Cholla's only timely claim is its challenge to the rejection of its application for a commercial source number. This claim brings into play Cholla's allegations of an Establishment Clause violation and discrimination on account of race.

Cholla argues that under the continuing violations doctrine, it may challenge defendants' ongoing policy against the use of materials from Woodruff Butte. Discrete acts are not actionable if time barred, even if related to acts alleged in timely filed charges. *See National R.R. Passenger Corp. v. Morgan*, 536 U.S. 101, 113-14 (2002); *Carpinteria Valley Farms, Ltd. v. County of Santa Barbara*, 344 F.3d 822, 828-29 (9th Cir. 2003); *RK Ventures, Inc. v. City of Seattle*, 307 F.3d 1045, 1061-62 (9th Cir. 2002). Nonetheless, the time bar makes little difference to Cholla's requests for declaratory and injunctive relief. By

[5] A four-year statute of limitations governs actions arising under federal statutes enacted after December 1, 1990. 28 U.S.C. § 1658. This uniform limitations period applies, for example, to hostile work environment and wrongful termination claims under § 1981 that were made possible by the Civil Rights Act of 1991. *See Jones v. R.R. Donnelley & Sons Co.*, 124 S.Ct. 1836, 1845-46 (2004). However, Cholla's claims were not made possible by a post-1990 statute or amendment and thus are not covered by § 1658's four-year limitations period. *See id.*

challenging the denial of Cholla's application for a commercial source number, without which Cholla's aggregate materials cannot be used in state construction projects, Cholla is challenging Arizona's policy against using materials from Woodruff Butte. Moreover, acts occurring more than two years before Cholla filed suit may be relevant background material in support of its timely claim. *Morgan,* 536 U.S. at 113.[6]

C. *Establishment Clause Claim*

Cholla alleges that the defendants' policy against using materials from Woodruff Butte in state construction projects violates the Establishment Clause of the First Amendment. On appeal, Cholla emphasizes the liberal notice pleading requirements and argues that the district court improperly evaluated the strength of Cholla's claim. Accepting as true the facts alleged and construing them in the light most favorable to Cholla, we conclude that the district court properly dismissed this claim. No evidence could bolster Cholla's Establishment Clause claim because it is premised on flawed analysis of the governing law.

Government conduct does not violate the Establishment Clause if (1) it has a secular purpose, (2) its principal or primary effect is not to advance or inhibit religion, and (3) it does not foster excessive government entanglement

[6] We note that the district court held that a two-year statute of limitations applies to all of Cholla's claims, but it appears that a one-year statute of limitations governs Cholla's state law claims. *See* Ariz. Rev. Stat. § 12-821; *Flood Control Dist. of Maricopa County v. Gaines,* 43 P.3d 196, 200 (Ariz. Ct. App. 2002). Nevertheless, the district court correctly held that the Eleventh Amendment bars Cholla's state law claims.

with religion. *See, e.g., Lemon v. Kurtzman,* 403 U.S. 602, 612-13 (1971). Particular attention is paid to whether the challenged action has the purpose or effect of endorsing religion. *County of Allegheny v. ACLU,* 492 U.S. 573, 592 (1989).

1. Secular Purpose

It is clear from Cholla's complaint that defendants' actions have the secular purpose of carrying out state construction projects in a manner that does not harm a site of religious, historical, and cultural importance to several Native American groups and the nation as a whole.

Putting aside for now the historical and cultural importance of Woodruff Butte, the secular purpose prong "does not mean that the law's purpose must be unrelated to religion – that would amount to a requirement that the government show a callous indifference to religious groups." *Corp. of Presiding Bishop v. Amos,* 483 U.S. 327, 335 (1987) (internal quotation marks omitted). Carrying out government programs to avoid interference with a group's religious practices is a legitimate, secular purpose. *Id.; Kong v. Scully,* 341 F.3d 1132, 1140 (9th Cir. 2003) ("Accommodation of a religious minority to let them practice their religion without penalty is a lawful secular purpose."); *Mayweathers v. Newland,* 314 F.3d 1062, 1068 (9th Cir. 2002). Cholla has alleged no facts that would support a conclusion that the state defendants were not motivated at least in part by this secular purpose. *See, e.g., Am. Family Ass'n, Inc. v. City and County of San Francisco,* 277 F.3d 1114, 1121 (9th Cir. 2002) (stating that a practice must be wholly motivated by religious purpose to fail the secular purpose test).

2. Primary Effect

According to Cholla's complaint, ADOT faced years of controversy about the destruction of Woodruff Butte. A federal district court in previous litigation awarded the Hopi Tribe a preliminary injunction requiring consultation with the Tribe before spending federal funds on a construction project using materials from Woodruff Butte because of the Butte's historical and cultural importance. The complaint's descriptions of the controversy and litigation over the land; the cultural and historical importance of Woodruff Butte in addition to its religious significance; and the Arizona State Historic Preservation Officer's conclusion that the Butte is an 'important cultural landmark' are inconsistent with Cholla's claim that advancing religion is the principal or primary effect of defendants' actions.

Because of the unique status of Native American societies in North American history, protecting Native American shrines and other culturally-important sites has historical value for the nation as a whole, much like Greece's preservation of the Parthenon, an ancient Greek temple of worship. Similarly, because of the central role of religion in human societies, many historical treasures are or were sites of religious worship. The Establishment Clause does not require governments to ignore the historical value of religious sites. Native American sacred sites of historical value are entitled to the same protection as the many Judeo-Christian religious sites that are protected on the NRHP, including the National Cathedral in Washington, D.C.; the Touro Synagogue, America's oldest standing synagogue, dedicated in 1763; and numerous churches that played a pivotal role in the Civil Rights Movement,

including the Sixteenth Street Baptist Church in Birmingham, Alabama.

Defendants' policy does not convey endorsement or approval of the Tribes' religions. *See County of Allegheny,* 492 U.S. at 592; *Buono v. Norton,* 371 F.3d 543, 548-50 (9th Cir. 2004) (holding that maintenance of a cross on public land violates the Establishment Clause because a reasonable observer might see the cross as an endorsement of Christianity). There is no suggestion that the state defendants favor tribal religion over other religions or that they would not protect sites of historical, cultural, and religious importance to other groups.

Moreover, defendants' policy does not *advance* religion, but rather implements ADOT's decision that state construction projects should be carried out in a way that does not *interfere* with the Tribes' religious practices or destroy religious sites that have historical significance. Accommodating religious practices that does not amount to an endorsement is not a violation of the Establishment Clause. *See Hobbie v. Unemployment Appeals Comm'n of Fla.,* 480 U.S. 136, 144-45 (1987) ("This Court has long recognized that the government may (and sometimes must) accommodate religious practices and that it may do so without violating the Establishment Clause."); *Kong,* 341 F.3d at 1139-40 (9th Cir. 2003) (holding that accommodating a religious minority in the administration of government programs does not offend the Establishment Clause); *Mayweathers,* 314 F.3d at 1068-69 (9th Cir. 2002) (holding that Congress may require states to accommodate prisoners' religious practices without impermissibly advancing religion).

3. Excessive Entanglement

Cholla has not alleged facts that would support an inference that the defendants' actions foster excessive government entanglement with religion. The only fact alleged relevant to entanglement is that the Tribes were consulted in the process of evaluating Cholla's application for a commercial source number. Some level of interaction between government and religious communities is inevitable; entanglement must be "excessive" to violate the Establishment Clause. *Agostini v. Felton,* 521 U.S. 203, 233 (1997); *KDM ex rel. WJM v. Reedsport School Dist.,* 196 F.3d 1046, 1051 (9th Cir. 1999) (noting that courts consistently find that routine administrative contacts with religious groups do not create excessive entanglement). In determining whether government action creates excessive entanglement with religion, the Supreme Court has looked to the character and purpose of the institutions benefitted. *See Bowen v. Kendrick,* 487 U.S. 589, 615-16 (1988) (concluding that monitoring of government grants given to nonprofit organizations that provide educational services did not amount to excessive entanglement because religiously affiliated organizations that may receive government funding are not "pervasively sectarian"). The institutions benefitted here, Native American tribes, are not solely religious in character or purpose. Rather, they are ethnic and cultural in character as well. *See Bear Lodge Multiple Use Ass'n v. Babbitt,* 2 F. Supp. 2d 1448, 1456 (D. Wyo. 1998) (concluding that a government policy benefiting Native American tribes did not constitute excessive entanglement with religion because "Native American tribes . . . are not solely religious organizations, but also represent a common heritage and culture").

Moreover, Cholla does not allege that the government officials participate in the Tribe's religious practices, inquire about the substance of their religious views, or monitor their religious practices. The facts alleged cannot support the conclusion that defendants' actions excessively entangle the government with the Tribes' religions.

In conclusion, the Establishment Clause does not bar the government from protecting an historically and culturally important site simply because the site's importance derives at least in part from its sacredness to certain groups.

D. *Discrimination Claims*

Cholla alleges that the state defendants' policy against the use of Cholla's aggregate in state construction projects violates its rights under the Civil Rights Act of 1866, 42 U.S.C. § 1981, which prohibits racial discrimination in the making and enforcement of contracts, by interfering with its right to contract freely to sell materials mined from Woodruff Butte. Additionally, Cholla alleges that the defendants violated its rights under Title VI, 42 U.S.C. § 2000d, which prohibits racial discrimination in programs that receive federal funding.

The district court correctly concluded that Cholla failed to state a claim that the defendants discriminated against it on the basis of race. Cholla's complaint contains vague allegations that the defendants' policy "discriminates against Cholla in favor of the Navajo, Hopi, and Zuni Indian Tribes." Had Cholla a viable claim, Cholla would have standing to sue for racial discrimination, even though it is a corporation, if it "either suffers discrimination harm cognizable under § 1981, or has acquired an

imputed racial identity." *Thinket Ink Info. Res., Inc. v. Sun Microsystems, Inc.*, 368 F.3d 1053, 1060 (9th Cir. 2004); *see also Parks Sch. of Bus., Inc. v. Symington*, 51 F.3d 1480, 1488 (9th Cir. 1995) (holding that a corporation had standing to sue under § 1981 alleging that defendants discriminated against it because it contracts with racial minorities).

Cholla's complaint does not allege that Cholla has an imputed racial identity and does not explain how the company suffered from racial discrimination. Cholla's complaint fails to allege facts from which one could infer that Cholla has an imputed racial identity, for example the race of Cholla's owner, McKinnon, or of anyone affiliated with Cholla. Cholla's complaint devotes itself primarily to arguing that defendants were motivated by the religious significance of the Butte, without alleging any facts from which one could infer that anyone's race in any way motivated the state defendants' actions. The district court did not err in dismissing Cholla's discrimination claims.[7]

E. *Claim under § 1983*

Section 1983 creates a cause of action for the vindication of federal rights. *See* 42 U.S.C. § 1983. Cholla treats its § 1983 claim as an independent, substantive claim. However, "one cannot go into court and claim a 'violation of § 1983' – for § 1983 by itself does not protect anyone against anything." *Chapman v. Houston Welfare Rights*

[7] The defendants argue that *programs* that receive federal funding, rather than the individual defendants who Cholla sued, are the proper defendants in a Title VI suit. *See, e.g., Shotz v. City of Plantation*, 344 F.3d 1161, 1169-70 (11th Cir. 2003); *Buchanan v. City of Bolivar*, 99 F.3d 1352, 1356 (6th Cir. 1996). Because Cholla failed to state a claim under Title VI, we do not reach this question.

Org., 441 U.S. 600, 617 (1979). "Section 1983 does not create any substantive rights; rather it is the vehicle whereby plaintiffs can challenge actions by governmental officials." *Henderson v. City of Simi Valley,* 305 F.3d 1052, 1056 (9th Cir. 2002). Cholla has no cause of action under § 1983 because it has not stated a viable claim that defendants violated its federal rights.

IV. CONCLUSION

All of the allegations in Cholla's complaint are barred by the Eleventh Amendment, time barred, or fail to state a claim upon which relief could be granted. Accordingly, the district court's dismissal of Cholla's complaint is

AFFIRMED.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

Cholla Ready Mix, Inc., Plaintiff,	)	No. CV-02-1185-PHX-FJM
	)	**ORDER**
vs.	)	(Filed Jan. 21, 2003)
Federal Highway Administration, et al., Defendants.	)	

The court has before it the State Defendants' Motion to Dismiss (doc. 12), Plaintiff's response (doc. 21), and the Defendants' reply (doc. 27). Also before the court is the Plaintiff's Motion for Leave to File a First Amended Complaint (doc. 19), including an unsigned copy of the proposed First Amended Complaint, the State Defendants' response in opposition (doc. 28), and the Plaintiff's reply (doc. 29).

Initially, the court GRANTS the Plaintiff's Motion for Leave to File a First Amended Complaint (doc. 19). The First Amended Complaint differs from the original complaint in three significant ways. First, it explicitly alleges claims under 42 U.S.C. §§ 1981, 1983, and 2000d. Second, it eliminates the equal protection claim. Third, it omits reference to monetary damages, except as available under 42 U.S.C. §§ 1981 and 2000d. We now consider the State Defendants' Motion to Dismiss in relation to the First Amended Complaint.

I. Statute of Limitations

As a preliminary matter, only one of Plaintiff's allegations fall within the two-year statute of limitations: the denial of Cholla's commercial source number pursuant to the Historical and Cultural Resources Regulation on June 26, 2000. All of the other factual allegations are dismissed as time barred.

II. Eleventh Amendment and *Ex Parte Young* Exception

The State Defendants move to dismiss all claims on Eleventh Amendment grounds. The Eleventh Amendment prohibits federal courts from hearing suits brought by private citizens against state governments, without the state's consent. In general, state immunity will also extend to state officials when the state is the real party in interest. Under the *Ex Parte Young* doctrine, however, the Eleventh Amendment does not bar a suit against a state official that alleges a violation of federal law and seeks only prospective relief.

Here, the Plaintiff seeks injunctive relief and a declaratory judgment based on both federal and state law claims, and monetary damages under 42 U.S.C. §§ 1981 and 2000d. Plaintiff's claim for money damages is barred by the Eleventh Amendment. Additionally, Plaintiff's demand for an "injunction directing Defendants to grant Cholla a commercial source number," falls beyond the scope of the *Ex Parte Young* exception because "it is in fact against the sovereign [since] the decree would operate against the [state]" by compelling the state to act. *Pennhurst State Sch. and Hosp. v. Haldeman*, 465 U.S. 89, 101-02 (1984) ("a suit is against the sovereign if the . . . effect

of the judgment would be to restrain the Government from acting, or compel it to act"). Finally, Plaintiff's state law claims are also barred by the Eleventh Amendment. *Id.* at 106.

The Plaintiff's remaining claims for declaratory and injunctive relief under federal law fall within the *Ex Parte Young* exception. Specifically, the Plaintiff seeks a declaratory judgment that the Historical and Cultural Resources Regulation violates the Establishment Clause and 42 U.S.C. §§ 1981, 1982, and 2000d. Plaintiff further seeks an injunction against Defendants' continued implementation and enforcement of that regulation.

III. Establishment Clause Claim

We turn now to Plaintiff's Establishment Clause claim. Under *Lemon v. Kurtzman,* 403 U.S. 602 (1971), a government action does not violate the Establishment Clause if it (1) has a secular purpose, (2) does not have the principal effect of advancing or inhibiting religion, and (3) does not foster an excessive entanglement with religion. Plaintiff argues that it has alleged sufficient facts to state an Establishment Clause claim under *Lemon* and that, as long as the claim asserts a legal theory that is cognizable as a matter of law, the merits of the claim are immaterial in a 12(b)(6) motion. It is true that a motion to dismiss for failure to state a claim should only be granted in extraordinary cases where it appears beyond doubt that the Plaintiff can prove no set of facts in support of the claim. Yet, even taking all of the alleged facts as true, it appears beyond doubt that Plaintiff will be unable to show that the Defendants violated the Establishment Clause under the standard set forth in *Lemon.* On its face, the Historical

and Cultural Resources Regulation is aimed at protecting sites of historical and cultural significance. That a protected site also has religious significance does not make the regulation unconstitutional. Therefore, the Establishment Clause claim is dismissed.

IV. Remaining Federal Claims

The remaining claims are also dismissed. Plaintiff has failed to state a claim under 42 U.S.C. § 1981 because it has not alleged any facts from which racial discrimination can be inferred. *White v. Wash. Pub. Power Supply Sys.*, 692 F.2d 1286, 1290 (9th Cir. 1982) ("section 1981 only redresses discrimination based on plaintiff's race"). Similarly, Plaintiff has failed to state a claim under 42 U.S.C. § 2000d because it has not alleged discrimination based on race, color, or national origin as required by the statute. Finally, all other claims having been dismissed, Plaintiff's § 1983 claim also fails.

IT IS THEREFORE ORDERED, granting Plaintiff's Motion for Leave to File a First Amended Complaint (doc. 19).

IT IS FURTHER ORDERED, granting State Defendants' Motion to Dismiss (doc. 12).

DATED this 17th day of January, 2003.

/s/ Frederick J. Martone
Frederick J. Martone
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

Cholla Ready Mix, Inc., Plaintiff, vs. Federal Highway Administration, et al., Defendants.	No. CV-02-1185-PCT ~~PHX~~-FJM **ORDER** (Filed Feb. 25, 2003)

The court has before it Plaintiff's Motion for Reconsideration (doc. 32), which includes an alternative request for certification of final judgment against State Defendants pursuant to Rule 54(b) of the Federal Rules of Civil Procedure.

IT IS ORDERED, denying Plaintiff's motion for reconsideration.

IT IS FURTHER ORDERED, granting Plaintiff's alternative request for certification of final judgment against State Defendants. We expressly determine that there is no just reason for delay and direct the entry of a final judgment as to the State Defendants.

DATED this 21 day of February, 2003.

/s/ Frederick J. Martone
Frederick J. Martone
United States District Judge

UNITED STATES DISTRICT COURT

DISTRICT OF ARIZONA

Cholla Ready Mix, Inc, Plaintiff, vs. Federal Highway Administration, et al., Defendants.	**JUDGMENT IN A CIVIL CASE** CV 02-1185 PCT FJM (Filed Feb. 25, 2003)

___ **Jury Verdict**. This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

_X_ **Decision by Court.** This action came for consideration before the Court. The issues have been considered and a decision has been rendered.

IT IS ORDERED pursuant to Rule 54(b), as the Court previously granted the Defendants Motion to Dismiss, that judgment is entered as to the State Defendants (Mendez, Swan, Belt, Crowther, Anderson, Duarte, Rosenberg, Garrison and Gasser) only, therefore the Plaintiff shall take nothing. This complaint and action are hereby dismissed.

February 25, 2003
Date

RICHARD H. WEARE
District Court Executive/Clerk

/s/ [Illegible]
(By) Deputy Clerk

cc: (all counsel)

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

CHOLLA READY MIX, INC., Plaintiff-Appellant, v. FEDERAL HIGHWAY ADMINISTRATION; et al., Defendants, and WILLIAM CIVISH, BLM Safford, Arizona Field Office District Manager; et al., Defendants-Appellees.	No. 03-15423 D.C. No. CV-02-01185-PCT-FJM **JUDGMENT** (Filed Nov. 2, 2004)

Appeal from the United States District Court for the District of Arizona (Phoenix).

This cause came on to be heard on the Transcript of the Record from the United States District Court for the District of Arizona (Phoenix) and was duly submitted.

On consideration whereof, it is now here ordered and adjudged by this Court, that the judgment of the said District Court in this cause be, and hereby is **AFFIRMED.**

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

CHOLLA READY MIX, INC., Plaintiff-Appellant, v. WILLIAM CIVISH, BLM Safford, Arizona Field Office District Manager; VICTOR MENDEZ, Secretary of the Department of Transportation (ADOT); JEFF SWAN, ADOT Holbrook District Engineer; WILLIAM BELT, ADOT Environmental Planning Services Department; THOR ANDERSON, ADOT Official; RICHARD DUARTE, ADOT Environmental Planning Section Manager; BETTINA ROSENBERG, ADOT Historic Preservation Coordinator; JAMES GARRISON, Arizona State Historic Preservation Officer; ROBERT GASSER, Arizona Parks Department Compliance Officer, Defendants-Appellees.	No. 03-15423 D.C. No. CV-02-01185-FJM District of Arizona, Phoenix ORDER (Filed Oct. 14, 2004)

Before: B. FLETCHER, TROTT, and FISHER, Circuit Judges.

Judges Trott and Fisher vote to deny the petition for rehearing en banc and Judge B. Fletcher so recommends.

The full court has been advised of the petition for rehearing en banc and no judge has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35.

The petition for rehearing en banc is denied.

UNITED STATES CONSTITUTION AMENDMENT I

Establishment of Religion

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press, or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

ARIZONA
DEPARTMENT OF TRANSPORTATION

STANDARD SPECIFICATIONS

for

ROAD AND BRIDGE CONSTRUCTION

2000

31-066

* * *

SECTION 104

(F) Termination of Contract:

If the Department elects to terminate the contract, the termination and the determination of the total compensation payable to the contractor shall be governed by the provisions of Subsection 108.11, "Termination of Contract for Convenience of the Department."

104.12 Environmental Analysis:

The contractor shall prepare an environmental analysis for approval by the Engineer, under the following conditions:

(A) If the contractor elects to provide material from a contractor-furnished source,

(B) If the contractor elects to utilize any site, to set up a plant for the crushing and processing of base and surfacing materials, or processing base, surfacing, or concrete materials which is not located on a site furnished by the Department or the site of a commercial operation, or

(C) If the contractor requests that the Engineer approve access to a controlled access highway at points other than legally established access points.

The contractor shall promptly advise the Engineer that it is preparing the analysis and shall submit it upon completion. The contractor should anticipate needing a minimum of 30 days to coordinate with the necessary jurisdictions or agencies and to prepare the analysis. The analysis will be reviewed by the Department and the contractor will be advised whether or not the analysis is acceptable as soon as the necessary determinations have been made. The contractor shall allow 14 days for the Department's review.

If the preparation, and approval of the environmental analysis causes a delay to a controlling activity of the project, the contractor may seek, and the Engineer may grant, an extension of time for the preparation of the analysis in accordance with the terms of Subsection 108.08. The time extension shall not exceed 30 working days.

An environmental analysis shall address itself to all environmental effects, including, but not limited to, the following:

(A) The location of the proposed source and haul road and the distance from the source to either an existing highway or an established alignment of a proposed Federal, State or County highway along with vicinity maps, sketches or aerial photographs.

(B) The ownership of the land.

(C) The identity and location of nearby lakes, streams, parks, wildlife refuges or other similar protected areas.

(D) The former use, if known, of the source and haul road and their existing condition.

(E) The identification of present and planned future land use, zoning, etc., and an analysis of the compatibility of the removal of materials with such use.

(F) The anticipated volume of material to be removed; the width, length and depth of the excavation; the length and width of the haul road and other pertinent features and the final condition in which the excavated area and haul road will be left, such as sloped sides, topsoil replaced, the area seeded, etc.

(G) The archaeological survey of the proposed source prepared by a person with acknowledged credentials, which credentials shall be attached to the survey. The survey shall be prepared in a State Historic Preservation Office standardized format. The survey shall identify cultural resources within the potential impact area of the materials source processing area, and haul road. Additionally the survey report shall identify historic or archaeological sites in the vicinity.

(H) If the proposed source and haul road will utilize Prime and Unique Farm land or farm land of statewide importance, a description of such remaining land in the vicinity and an evaluation whether such use will precipitate a land use change.

(I) A description of the visual surroundings and the impact of the removal of materials on the visual setting.

(J) The effect and mitigation of such effects on access, public facilities and adjacent properties.

(K) The relocation of business or residences.

(L) Procedures to minimize dust in pits and on haul roads and to mitigate the effects of such dust.

(M) A description of noise receptors and procedures to minimize impacts on these receptors.

(N) A description of the impact on the quality and quantity of water resulting from the materials operation shall be provided. The potential to introduce pollutants or turbidity to live streams and/or nearby water bodies shall be addressed. Measures to mitigate potential water quality impacts shall be coordinated through the Arizona Department of Environmental Quality.

(O) A description of the impact on endangered or threatened wildlife and plants and their habitat. The analysis of potential impact to plants and wildlife shall be coordinated through the Arizona Game and Fish Department and US Fish and Wildlife Service. Compliance with the Arizona Native Plant Law shall be coordinated through the Arizona Commission of Agriculture and Horticulture.

(P) A discussion of the effects of hauling activities upon local traffic and mitigating measures planned where problems are expected.

(Q) A description of the permits required, such as zoning, health, mining, land use, flood plains (see Section 404 of the Clean Water Act), etc.

(R) The effect of removing material and/or stockpiling material on stream flow conditions and the potential for adverse impacts on existing or proposed improvements within the flood plain which could result from these activities.

Guidance in preparing the environmental analysis is available from ADOT's Environmental Planning Section, 205 South 17th Avenue, Room 240E, Phoenix, AZ 85007, phone (602) 712-7767.

104.13 Value Engineering Proposals by the Contractor:

Proposals may be submitted to the Engineer for modifying the plans, specifications, or other requirements of the contract for the sole purpose of reducing the total costs of construction without impairing in any manner the essential functions or characteristics of the project, including service life, economy of operations, ease of maintenance, benefits to the traveling public, desired appearance or design and safety standards.

After execution of the contract, an initiative may be recommended by the contractor. The initiative must be identified as a Value Engineering Proposal (VEP), and may include modifications to the plans or specifications, construction phasing or procedures, or other contract requirements.

Any cost savings generated to the contract as a result of VEP offered by the contractor and approved by the Department will be shared equally between the contractor and the Department as specified in Subsection 104.13(D).

* * *

SECTION 1001 MATERIAL SOURCES:

1001-1 Description:

The work under this section shall consist of the procuring of borrow, subbase and base materials, mineral aggregates for concrete structures, and mineral aggregates for surfacing materials specified for use from sources either designated on the project plans or in the Special Provisions or from other sources.

1001-2 General:

The contractor shall determine for itself the type of equipment and work required to produce a material meeting the specifications.

Unless otherwise specified, pits and quarries shall be so excavated that water will not collect and stand therein. Sites from which material has been removed shall, upon completion of the work, be left in a neat and presentable condition. Where practicable, borrow pits, gravel pits, and quarry sites shall be located so that they will not be visible from the highway.

The contractor shall provide an environmental analysis, as specified in Subsection 104.12, for any contractor-furnished source proposed for use. Environmental analyses prepared for contractor-furnished sources, and approved by the Department later than January 1, 1999, will be acceptable.

A list of sources known by the Department to have approved environmental analyses will be kept on file at the ADOT Materials Group, mail drop 068R, 1221 N. 21st

Avenue, Phoenix, Arizona 85009-3740. The contractor may propose the use of these sources as a contractor-furnished source without the requirement of submitting a new Environmental Analysis, provided that all other requirements of this section have been met.

It shall be the responsibility of prospective bidders to conduct any necessary on-site investigations and/or explorations, and to satisfy themselves that the quantity and/or quality of material exists in the sources listed above. No representation regarding quality or quantity of materials is made by the Department.

1001-2.01 Definitions:

All material sources shall fall into one of the following two categories:

Department-Furnished Source
Contractor-Furnished Source

A Department-furnished source shall be defined as a material source for which the Department has prospected, taken samples, tested, prepared an Environmental Analysis, secured the rights for its use including ingress and egress, and which may be available for the contractor's use on a specific project.

A contractor-furnished source shall be defined as any source other than a Department-furnished source, and shall include commercial operations as defined below.

A commercial operation shall be defined as a material source at which the owner or producer has been located for at least the preceding 12 months prior to award of contract, and routinely engaged during regular business

hours on a consistent basis in the processing and selling of sand, rock, ready mixed Portland cement concrete, asphaltic concrete and other similar products to all parties. The company shall have an Arizona retail sales tax license. The contractor shall furnish documentation to the Engineer that the source is an active commercial operation. This documentation may include evidence of sales or other data acceptable to the Engineer. A commercial source, whenever referenced in the specifications, shall be considered to be a commercial operation, as defined herein.

Should the contractor elect to set up a concrete or asphalt batch plant within or adjacent to a commercial operation for the exclusive supply of contract items, the contractor's operation shall not be considered part of the commercial operation.

1001-2.02 Material Sources in Flood Plains:

The use of material sources situated in the 100-year flood plain of any stream or watercourse, and located within one mile upstream and two miles downstream of any highway structure or surfaced roadway crossing, shall be limited as follows:

(A) Existing commercial operations, as defined in Subsection 1001-2, shall not be utilized as a source of borrow.

(B) No new source or existing non-commercial source will be approved for any materials except as specified in the following subparagraph (C).

(C) Surplus material from agency-administered flood control management projects may be used as borrow material only if the contractor submits written evidence to the Engineer that the

flood control agency project was fully designed and funded prior to the date of advertisement for bids on the Department project.

(D) Material sources located on Native American Indian Reservations will be considered for use based on an individual analysis. The analysis shall include a review of applicable land use plans, flood plain management plans, environmental plans, applicable laws and regulations pertaining to Indian Reservations, and an engineering analysis of the effects on any highway facility or structure. The contractor shall obtain from the Native American Tribal Council all permits, licenses, and approvals and present to the Department for review. The Department will review each request on a case by case basis.

The location of any new material source or existing non-commercial material source proposed for use on the project shall be reviewed by the appropriate agency having flood plain management jurisdiction for the area in which the proposed source is located. The contractor shall obtain a letter from the agency addressed to the Engineer certifying that the location of the proposed source conforms to the requirements of the specifications.

Contractors seeking a flood plain material source are cautioned that Section 404 of the Clean Water Act may prevent use of the source unless an appropriate permit is first obtained from the U.S. Army Corps of Engineers.

If a flood plain source is being considered for use, the contractor is advised to contact Environmental Planning Services of ADOT to insure

that the source will be obtainable within the required time frame.

1001-3 Department-Furnished Sources:

1001-3.01 General:

The use of a Department-furnished source is not mandatory.

1001-3.02 Information Available:

The approximate location, the kind of material, the name and address of the owner, the amount of royalty charges, and other relevant information will be available for review from the Materials Group, 1221 N. 21st Avenue, Phoenix, Arizona 85009-3740.

The available information should be considered at most as only a starting point for those prospective bidders choosing to use the source.

It shall be the responsibility of prospective bidders to conduct any necessary on-site investigations and/or explorations, and to satisfy themselves that the quantity and/or quality of material exists in the source in the event their bids are predicated upon the use of the source. Whether a source will in fact yield material of sufficient quantity or quality to meet the specific requirements may not have been determined.

Prospective bidders are advised that an agency having jurisdiction over the source, such as the Forest Service, Bureau of Land Management, Bureau of Reclamation, the State Land Department, etc., or the owner, as a condition to the use of the source, may have imposed certain obligations. The contractor who uses such a source shall assume

full contractual responsibility for any and all of these obligations imposed either by the agency having jurisdiction or by the owner. Specific requirements may or may not be available, and prospective bidders considering such a source are urged to make themselves fully aware of any and all requirements.

It shall be the responsibility of the bidder to ensure that Environmental Analysis complies with existing laws, rules, regulations.

1001-3.03 Usage of Materials:

Except as hereinafter provided, materials removed from Department-furnished sources shall be used only for the specific project and purpose for which the source was obtained.

Should the contractor desire to remove and use material other than that specified for use, prior approval by means of a supplemental agreement shall be obtained. The contractor shall furnish the Engineer with evidence that the owner of the source has agreed to such use. The Department reserves the right to disapprove any request when it is considered to be in the best interest of the Department to conserve such material for future use.

If the Department approves the removal and use of such material, the quantity of the material removed and the quantity of any waste material resulting from its removal will be deducted from the estimated quantity of material shown to be available.

1001-3.04 Royalty Charges:

The amount of the royalty charges and the name and address of the party to whom royalties are to be paid will be available from the Materials Group, 1221 N. 21st Avenue, Phoenix, Arizona 85009-3740.

Prior to the time of final payment, the contractor shall furnish the Engineer with evidence such as an endorsed canceled check that all royalty charges have been paid. In the event that royalty charges have not been paid, the Department reserves the right to make such payment and to deduct the amount of such payment from monies due the contractor.

The final billing and payment for material extracted from sources under the jurisdiction of the State Land Department will include a small administrative charge based on the total amount of royalties due for materials removed.

Upon receipt of the final billing from the Department of Transportation, the contractor shall mail a check, payable to the State hand [sic] Department, addressed as follows:

Arizona Department of Transportation
Field Reports Services
206 South 17th Avenue
Phoenix, Arizona 85007

1001-3.05 Performance Bonds:

If Department-furnished sources are under the jurisdiction of either the State Land Department or the Bureau of Land Management, the contractor shall secure a performance bond. A fully executed copy of the bond shall be furnished the Engineer along with evidence that a fully

executed copy has been sent to the State Land Department or the Bureau of Land Management.

The form of the Performance Bond will be included in the proposal pamphlet. For pits under the jurisdiction of the Bureau of Land Management, the surety shall be a company listed under "Surety Companies Acceptable on Federal Bonds." This list is published annually as of July 1 in the Federal Register.

Performance bonds shall be conditioned upon the compliance with the requirements of the State Land Department and the Bureau of Land Management and the requirements of the specifications for the clearing of pit sites, the removal of material and the cleaning up of pit sites.

Copies of fully executed performance bonds shall be mailed as follows:

State Land Commission
State Land Department
1624 West Adams Street
Phoenix, Arizona 85007

Bureau of Land Management
Manager, Land Office
2400 Valley Bank Center
Phoenix, Arizona 85073

1001-3.06 Sampling and Testing:

The results of any sampling and testing accomplished by the Department will be available from the Materials Group, 1221 N. 21st Avenue, Phoenix, Arizona 85009-3740.

1001-4 Contractor-Furnished Source:

1001-4.01 Approval Requirements:

(A) General:

The contractor shall promptly advise the Engineer as to the source that it proposes to use.

The contractor acknowledges that all the conditions set forth in this subsection must be met before the source may be used.

Other than sampling and testing, the requirements of this subsection shall be completed prior to initiation of any activities which disturb the existing conditions at the proposed source.

The contractor further acknowledges that no additional compensation will be made on account of any delays in preparing or modifying the environmental analysis, obtaining approval for the use of a contractor-furnished source, or the failure to obtain approval of a contractor-furnished source. An extension of contract time may be granted only in accordance with Subsections 104.12 or 1001-4.01(B)(4),

(B) General Requirements For Approval:

The use of a contractor-furnished source will require written approval by the Engineer. No approval will be given until the contractor has complied with the following conditions:

(1) The contractor has submitted an Environmental Analysis of the source proposed for use and the Department has reviewed the analysis and satisfied itself that the use of such source will not have an adverse social, economic or environmental impact. The requirements of this condition shall be completed prior to initiation of any activities which substantially disturb the existing conditions at the proposed source.

(2) Except for commercial operations, the contractor has furnished the Engineer with evidence that

he has secured the rights to the source, including ingress and egress.

(3) The Department has determined that the material from the proposed contractor-furnished source not only meets the requirements, but is also compatible with the established project design criteria developed by the ADOT Materials Group and based on the soil support value of the embankment; and, except for commercial operations, the sampling and testing herein specified has been satisfactorily completed.

(4) For a contractor-furnished source which is not a commercial operation as defined in Subsection 1001-2.01, the contractor shall notify the Arizona Department of Agriculture, in accordance with the Arizona Native Plant Law, at least 30 days prior to any clearing operations of less than 40 acres on private land, 60 days prior to clearing operations of 40 or more acres on private land, and 60 days prior to any clearing of state land, regardless of size. If the Engineer is convinced that the contractor has made every effort to comply with the provisions of the Arizona Native Plant Law in contacting the Department of Agriculture, the Engineer will increase the number of contract days by the amount of time required for action by the Department of Agriculture. The increase will not exceed 20 contract days and will be concurrent with any increase allowed for the preparation of the Environmental Analysis.

(C) Historical and Cultural Resources:

If the Department determines that the proposed use will have major adverse impact on cultural or historic

resources, the Department will not allow the use of the source.

1001-4.02 Testing Requirements:

The contractor shall furnish equipment and personnel and shall obtain representative samples of the material under the supervision of the Engineer. At the option of the contractor, the material shall be tested by either the Department or by a testing laboratory approved by the Department.

If testing is performed by a testing laboratory, the contractor shall arrange for the samples to be delivered to the testing laboratory. Tests shall be performed using appropriate test procedures referred to in the sections of the specifications in which the specific material requirements are described.

The contractor shall make the arrangements necessary to see that the testing laboratory submits the results of the tests to ADOT Materials Group. The contractor shall submit to ADOT Materials Group sufficient material from the samples taken so that ADOT Materials Group may test the materials and verify the results.

The cost of all sampling and testing, including the cost of supervision by the Engineer, shall be borne by the contractor until the testing has been satisfactorily completed.

Exploratory sampling and testing activities conducted prior to the Department's approval shall be limited to the minimum amount of vegetation removal and surface disturbance required to obtain representative samples. The contractor shall not produce material, mobilize

crushing equipment or clear a worksite prior to approval of the Environmental Analysis.

The use of material from commercial operations will require written approval by the Engineer. No approval shall be assumed, nor will it be made, until the Department has determined that the material not only meets the specified requirements, but is also compatible with the established project design criteria developed by ADOT Materials Group, and based on the soil support value of the embankment materials and the structural coefficients of the base and surfacing materials.

Every effort will be made by the Department to advise the contractor as quickly as possible that the source it proposes to use has been either approved or disapproved. The contract time will not be adjusted because of any time required by either the contractor or the Department to sample and test the material and to determine the quality of the material.

1001-5 Blank

1001-6 Special Access:

If there is a Department-furnished source, the point(s) at which special access to a controlled access highway may be allowed will generally have been considered and, if appropriate, will be shown on the project plans. Such access shall be in accordance with the requirements specified in the Special Provisions and on the project plans.

The contractor may make a request to the Engineer to approve special access to a controlled access highway if:

(1) Special access is not shown on the project plans,

(2) The contractor elects not to furnish material from the Department-furnished source, or

(3) There is no Department-furnished source.

The request by the contractor shall be accompanied by an Environmental Analysis and by documents which specify the point(s) of access, the acquisition of right-of-way, the manner in which access will be attained, the traffic control plan, and crossovers, along with all other appropriate data which will allow the Engineer to evaluate its request. If the request is approved, a supplemental agreement shall be entered into.

All costs associated with the special access requested by the contractor shall be borne by the contractor, including, but not limited to, cattle guards, fences, gates and restoration work.

When access is not being utilized, gates shall be closed and locked. Upon completion of all operations, the area within the right-of-way which has been disturbed shall be restored to the condition existing prior to the contractor's operations.

The decision by the Engineer to deny a request by the contractor will be considered to be final.

1001-7 Operations at Source:

1001-7.01 General Requirements:

The requirements of Subsection 1001-7 shall not apply to commercial operations.

In Department-furnished sources the contractor shall conduct its operations in such a manner as to preserve available materials in excess of project requirements.

The contractor shall notify the Engineer in advance of operations at the source. Notice shall be given before and after clearing and stripping and before and after cleaning up.

1001-7.02 Clearing and Stripping:

Before beginning stripping, the contractor shall clear and grub the source as necessary to prevent the contamination of materials to be used in the work. Clearing and grubbing shall be in accordance with the requirements of Section 201, except that the resulting surface need not be leveled and vegetable matter need not be separated from any overburden which the Engineer determines to be unsuitable for any future use and which is to be wasted.

In the disposal of all tree trunks, stumps, brush, limbs, roots, vegetation and other debris removed, the contractor shall comply with the requirements of Title 36, Public Health and Safety, Chapter 6, Article 8, Air Pollution, of the Arizona Revised Statutes and with the Rules and Regulations for Air Pollution Control, Article 7, adopted by the Arizona Department of Environmental Quality pursuant to the authority granted by the Statutes.

Burning will be permitted only after the contractor has obtained a permit from the Arizona Department of Environmental Quality and from any other Federal, State, County or City Agency that may be involved.

When stripping is required, overburden shall be removed to the extent necessary to remove all undesirable materials and shall, at all times, be kept stripped at least five feet beyond the working face of the area being excavated.

1001-7.03 Extraction of Materials:

Materials shall be removed from the source in a workmanlike manner. In order to produce acceptable material in the amount and gradation required, it may be necessary for the contractor to do any or all of the following, along with any other similar operations usually associated with the extraction, processing and production of the particular material being produced:

Move materials from one area to another.
Perform additional screening.
Remove, wash and waste material.
Blend materials.
Revise crushing methods.
Remove deleterious materials such as clay balls, roots and sticks.

If the Engineer determines that the material in a source is stratified, all material except borrow shall be removed for the full depth in such a manner as to produce a uniform blend of the material. Placing the material from different areas and depths into a surge pile and removing material from the surge pile by cutting through the pile will be acceptable provided that a uniformly blended material is obtained.

Material sources located in drainage channels such as washes, river beds, etc., may experience seasonal variations in the depth of ground water. In order to produce the quantity of material estimated to be available in Department-furnished sources, the contractor may be required to work below the water table.

1001-8 Fences and Cattle Guards:

Where the haul roads to material sources cross existing fence lines in areas where there is livestock of any kind,

temporary cattle guards shall be installed by the contractor at each crossing.

The livestock operator or owner shall be contacted prior to the beginning of any operations and effective measures shall be taken and means provided by the contractor to prevent livestock from straying.

In operations where conditions will exist that are dangerous to livestock of any kind, temporary cattle guards and fence shall be installed around the pit area by the contractor to protect livestock.

Temporary cattle guards and fence installed by the contractor shall be removed and existing fence disturbed shall be replaced or reconstructed and all fence shall be left in as good condition as it was prior to the beginning of work.

1001-9 Cleaning Up:

The requirements of this subsection shall apply to contractor-furnished sources to the extent that they are required by the Environmental Analysis and by the owner. The requirements of Subsection 1001-9 shall not apply to commercial operations.

All overburden and other undesirable materials removed and all piles of waste materials resulting from operations in Department-furnished sources shall be deposited within the excavated area of the source and the material shall be leveled as directed. In the event that the Department-furnished source contains material needed for future use, the placement of such materials within the excavated area shall be as directed. All debris shall be removed and disposed of and, if directed, all open test holes shall be filled. The sides of Department-furnished sources shall be

sloped and smoothed so that livestock can enter and leave the excavated area safely. Unless otherwise specified, all haul roads constructed to Department-furnished sources shall be obliterated and, as far as practicable, the ground left in as good condition as it was prior to hauling.

1001-10 Method of Measurement and Basis of Payment:

Except as may be otherwise specifically provided for in this section or elsewhere, no measurement or direct payment will be made for any costs involved in the procuring of materials. Such costs shall be considered as included in the cost of contract items.

SECTION 1002 PAINT:

1002-1 Requirements:

(A) General:

All paints furnished shall be ready-mixed at the manufacturer's plant, except for aluminum paint and zinc paint, which shall be mixed at the project site or fabricator just prior to application. All paints shall be standard paint products of the manufacturer with published product data sheets and shall comply in all details with the paint specifications as listed herein.

Ready-mixed paint shall be homogeneous, free of contaminants, and shall be of a consistency suitable for the use for which it is specified. The pigment shall be finely ground and properly dispersed in the vehicle, according to the requirements for the type of paint, and this dispersion shall be such that the pigment does not settle appreciably, does not cake or thicken in the paint container, and does

not become granular, jelled or curdled. Any settlement of pigment in the paint shall be easily dispersed with a paddle so as to produce a smooth uniform paint of the proper consistency. The manufacturer shall include in the paint the necessary additives for control of sagging, leveling, drying, drier absorption and skinning.

Paint shall be furnished in new, unopened air-tight containers, which are clearly labeled with the exact title of the paint, Federal Specification number when applicable, name and address of the manufacturer, product code, date of paint manufacture, and the lot or batch number. The containers shall meet U.S. Department of

* * *

William Perry Pendley
Christopher T. Massey
MOUNTAIN STATES LEGAL FOUNDATION
2596 South Lewis Way
Lakewood, Colorado 80227
Tel: 303-292-2021 x16
Fax: 303-292-1980
Attorneys for Plaintiff

Norman D. James
Arizona Bar. No. 006901
FENNEMORE CRAIG, PC
3003 North Central Avenue, Suite 2600
Phoenix, Arizona 85012-2913
Tel: 602-916-5000
Fax: 602-916-5999
Local Counsel for Plaintiff

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

CHOLLA READY MIX, Inc.,

Plaintiff,

v.

Federal Highway Administration ("FHWA"); MARY PETERS, Federal Highway Administrator; ROBERT HOLLIS, FHWA Arizona Division Administrator; NATHAN BANKS, FHWA Phoenix District Engineer; VIRGINIA CHERWEK, FHWA Associate Chief Counsel for Environmental, Planning, and Property Law; KATHLEEN CLARKE, Director of the Bureau of Land Management ("BLM"); WILLIAM CIVISH, BLM Safford,

No. CV 02-1185
PCT FJM

PLAINTIFF'S FIRST AMENDED COMPLAINT

(Filed Feb. 03, 2003)

Arizona Field Office District Manager; JOHN L. NAU, III, Chairman of the Advisory Council on Historic Preservation ("ACHP"); JOHN M. FOWLER, ACHP Executive Director; DON KLIMA, ACHP Director of Office of Planning and Review; MARY ANN NABER, ACHP Office of Planning and Review official;

Federal Defendants, and

VICTOR MENDEZ, Secretary of the Arizona Department of Transportation (ADOT); JEFF SWAN, ADOT Holbrook District Engineer; THOR ANDERSON, ADOT official; RICHARD DUARTE, ADOT Environmental Planning Section Manager; BETTINA ROSENBERG, ADOT Historic Preservation Coordinator; JAMES GARRISON, Arizona State Historic Preservation Officer; ROBERT GASSER, Arizona Parks Department Compliance Officer;

State Defendants.

Nature of the Claim

1. The Arizona Department of Transportation ("ADOT"), the Arizona State Parks Department through the State Historic Preservation Officer, the Federal Highway Administration ("FHWA"), the Advisory Council on Historic Preservation ("ACHP"), and the Bureau of Land

Management ("BLM") individually and collectively maintain and enforce a policy against the mining of Woodruffe [sic] Butte. The policy results directly from a belief that the Butte is considered sacred by Hopi, Zuni, and Navajo Indians. Cholla Ready Mix, Inc. ("Cholla") is – or would be but for the enforcement of that policy – engaged in the mining and leasing of Woodruff Butte as a materials source. Cholla challenges the policy, those who implement it, and any manner in which it is implemented, on the grounds that it violates Cholla's right against establishment of religion, Cholla's right against special laws, and Cholla's right to equal protection of the laws.

Jurisdiction and Venue

2. This Court has jurisdiction over this matter pursuant to 28 USC §§ 1331 and 1343 because the matter in controversy arises under the laws and Constitution of the United States, including the Establishment Clause of the First Amendment and the Civil Rights Act of 1871 (as amended), 42 U.S.C. §§ 1981, 1983, and 2000d.

3. This Court has supplemental jurisdiction over each of the state law claims, which arise under the Arizona Constitution, pursuant to 28 USC § 1367. These claims are related closely to the violations of the United States Constitution and the Civil Rights Act of 1871 (as amended) and form part of the same case or controversy under Article III of the United States Constitution.

4. Venue rests properly in this Court pursuant to 28 USC § 1391(b) and (e) because a substantial part of the events giving rise to the claims occurred in Arizona and because Cholla and at least one of the Defendants resides in Arizona.

Parties

5. Cholla Ready Mix, Inc. is a corporation having its principle place of business in the State of Arizona. It is engaged primarily in the mining and sale of aggregate materials from, and leasing of, Woodruff Butte. Dale McKinnon, sole shareholder of Cholla, along with other members of his family, own the Butte in fee simple. Accordingly, Cholla has exclusive access to the Butte as a materials source.

6. All Defendants are sued in their official capacities.

Federal Defendants

7. The Federal Highway Administration is part of the United States Department of Transportation. The FHWA administers building and maintenance of roads on federal land and provides technical and financial assistance to state and local governments for building and maintaining roads on state and local land.

8. Mary Peters is the Federal Highway Administrator and forr r Secretary of ADOT. Defendant Peters is the chief officia. of FHWA and is responsible ultimately for the conduct of FHWA officials acting within the scope of their employment. Defendant Peters was responsible for the conduct of ADOT officials acting within the scope of their employment while she was Secretary of ADOT.

9. Robert Hollis is the Division Administrator for FHWA's Arizona Division. Defendant Hollis bear responsibility for the conduct of Division employees acting within the scope of their employment and also for his own conduct. Such conduct includes being the signatory to much of

the correspondence involved in the conduct that forms the basis of this lawsuit.

10. Nathan Banks is the District Engineer for FHWA's Phoenix District. Defendant Banks participated in the formulation of ADOT's challenged regulations as a remedy for the purported demands of Indians regarding Woodruff Butte.

11. Virginia Cherwek is FHWA's Associate Chief Counsel for Environmental, Planning, and Property Law. Defendant Cherwek participated in the formulation of ADOT's challenged regulations as a remedy for the continued demands of Indian tribes regarding Woodruff Butte.

12. The Bureau of Land Management ("BLM") is an agency within the United States Department of the Interior. BLM administers and manages certain federal lands, some of which are adjacent to Woodruff Butte.

13. Kathleen Clarke is the Director of the BLM. Defendant Clark is responsible ultimately for the conduct of BLM officials acting within the scope of their employment.

14. William Civish is the District Manager of BLM's Safford, Arizona Field Office. Defendant Civish is responsible directly for conduct by BLM officials that forms part of the basis of this lawsuit.

15. Gail Acheson or her successor is a BLM Area Manager. Defendant Acheson signed the BLM Land Closure Order that forms part of the conduct that is the basis of this lawsuit.

16. The Advisory Council on History Preservation ("ACHP" or "the Council") is a federal entity constituted under the National Historic Preservation Act. The Council is charged with administering federal historic preservation programs.

17. John L. Nau, III is Chairman of ACHP. John M. Fowler is Executive Director of ACHP. Defendants Nau and Fowler share responsibility for the conduct of ACHP officials acting within the scope of their employment.

18. Don Klima is the Director of ACHP's Office of Planning and Review. Defendant Klima is responsible for the conduct of Planning and Review officials acting within the scope of their employment and is a signatory to much of the correspondence involved in the conduct that forms the basis of this lawsuit.

19. MaryAnn Naber is an official in ACHP's Office of Planning and Review and was involved directly in much of the conduct that forms the basis of this lawsuit.

State Defendants

20. ADOT is the primary agency of the State of Arizona for the construction of roads and bridges. Various of the State Defendants are ADOT officials.

21. Victor Mendez is Secretary of ADOT. The Secretary of ADOT bears ultimate responsibility for the conduct of ADOT and ADOT officials acting within the course and scope of their employment. Defendant Mendez bears responsibility for the maintenance and implementation of ADOT's policy against use of Woodruff Butte as a materials source.

22. Jeff Swan is the District Engineer for ADOT's Holbrook District. Defendant Swan is the person or official most directly responsible for day to day maintenance and implementation of ADOT's policy against use of Woodruff Butte as a materials source.

23. Thor Anderson is an ADOT official involved with applications for commercial source numbers. Defendant Anderson managed Cholla's most recent application for a commercial source number. That application was denied.

24. Richard Duarte is Manager of ADOT's Environmental Planning Section. In that capacity, Defendant Duarte bore responsibility for granting or denying Cholla's most recant application for a commercial source number. Defendant Duarte denied that application.

25. Bettina Rosenberg is an ADOT Historic Preservation Coordinator in the Environmental Planning section. Defendant Rosenberd [sic] was involved with the conduct that forms the basis of this lawsuit.

26. James Garrison is the Arizona State Historic Preservation Officer ("SHPO"). The State Historic Preservation Office is a division of the Arizona Parks Department. Defendant Gasser [sic] is responsible for identification, evaluation, and preservation of historic resources. SHPO decided, in the early 1990s, that Indian religious sites on the private land of Woodruff Butte should be preserved.

27. Robert Gasser was a Compliance Officer with the Arizona Parks Department at the time of the conduct that is the subject of this lawsuit. Defendant Gasser is currently an employee of ADOT. In his official capacity with Arizona Parks, Defendant Gasser recommended that a

private citizen should preserve Indian religious sites on the private land that is Woodruff Butte.

Statement of Facts

28. The Federal Highway Administration of the United States Department of Transportation uses a system of geographic districts for administrative purposes. Woodruff Butte ("the Butte") is located in what the FHWA refers to as the Holbrook District.

29. More specifically, Woodruff Butte is located in Navajo County, Arizona, at Section 8, Township 16 North, Range 22 East. It is described still more particularly by the Joint Tenancy Deed recorded in the office of the Navajo County Recorder on September 25, 1995, at 11:35 a.m. For purposes of this Complaint, the term "Woodruff Butte" refers solely to the land owned by the McKinnons as described in that Joint Tenancy Deed.

30. Woodruff Butte is a source of materials for road construction.

31. Woodruff Butte is the most cost effective source of material in the Holbrook District. The value of the material derives from its high density, hardness, and low absorbency, resulting in unusually high concrete strengths and reduced oil usage in the paving process.

32. Woodruff Butte is private land. No governmental or public entity, be it federal, state, municipal, or tribal, owns any interest whatsoever in the Butte.

33. In 1990, Dale McKinnon and his family leased Woodruff Butte from Norman Turley and began mining

operations. The McKinnons' mining enterprise was incorporated as Black Rock Construction, Inc. ("Black Rock").

34. The Hopi, Zuni, and Navajo Indian Tribes passed resolutions against the mining of Woodruff Butte in or about 1990, shortly after mining operations on Woodruff Butte began.

35. As a result of these resolutions, Defendants or some of them, assert that they believe Woodruff Butte is considered sacred ground by the Hopi, Zuni, and Navajo Indian Tribes.

36. In or around 1990, the Arizona State History Preservation Officer ("AzSHPO") declared Woodruff Butte eligible for listing on the National Registry of Historic Places ("NRHP"). This eligibility has ramifications under the National Historic Preservation Act even though Woodruff Butte has never actually been listed on the National Registry of Historic Places.

37. AzSHPO declared Woodruff Butte eligible for the NHRP because AzSHPO found that the tribes consider Woodruff Butte sacred.

38. The McKinnons bought fee simple title to the mined portion of Woodruffe Butte for $100,000 from Norman Turley on September 17, 1991.

39. A professional appraisal conducted in the mid-1990s determined that in full use, Woodruff Butte could generate some $300,000 in annual profits for forty to fifty years.

40. On June 6, 1991, AD0T granted a commercial source permit, number CMO280, to Black Rock for mining and to supply aggregate from Woodruff Butte. Then-existing

ADOT regulations defined a "commercial source" as any source that had been selling material in ordinary commerce for more that [sic] a year. Black Rock's use of Woodruff Butte qualified.

41. On January 23, 1995, Black Rock was consolidated with Cholla Ready Mix, Inc. by Articles of Consolidation pursuant to Arizona Revised Statutes, §§ 10-072 through 75. Black Rock was the surviving corporation, but was renamed Cholla Ready Mix, Inc. Under the name Cholla, the surviving entity continued the mining and leasing operations on Woodruff Butte and kept commercial source number CM0280. (Accordingly, for purposes of clarity, all allegations regarding Black Rock or Cholla are attributed to Cholla).

Injury

42. In summer 1990, Cholla was mining Woodruff Butte under lease from Mr. Turley. Specifically, Cholla was working toward filling a large purchase order from Tanner Construction.

43. On July 11, 1990, Defendant Gasser "recommend[ed]" by letter to Mr. Turley that Mr. Turley should "avoid impacts to the Hopi shrines in the area." Defendant Gasser admitted in his letter the Parks Department "has no authority over religious shrines," however.

44. On July 18, 1990, William Belt, at the time an official in ADOT's Environmental Planning Services Department, sent a letter to Navajo Nation Historic Preservation Officer Alan Downer stating that ADOT had decided not to use materials from Woodruff Butte. This allegation is likely to have evidentiary support after

reasonable opportunity for further investigation and discovery.

45. On June 27, 1991, Barbara Crowther, at the time an ADOT official, wrote to Tanner Construction discouraging Tanner from further use of materials from Woodruff Butte. In that letter, Crowther acknowledged that ADOT had no legal authority in this regard. Crowther instead suggested that Tanner should be concerned about its own public image and therefore ought to show proper "sensitivity to this issue."

46. Before the Tanner order could be completed, ADOT official(s) informed Tanner that ADOT would not pay for material mined from Woodruff Butte, forcing Tanner to seek an alternate materials source. Tanner cancelled the remainder of its order with Cholla as a result.

47. On May 11, 1992, in an ADOT pre-construction "Partnering Workshop," ADOT listed "potential problem with the Woodruff Pit" as an issue for discussion and ADOT expressly discouraged use of Woodruff Butte as a materials source.

48. Partnering workshops are meetings between ADOT officials and project contractors. Such workshops precede most every new ADOT project.

49. ADOT suggested, at the Partnering Workshop described in paragraph 47 above, that contractors could use Hennessy Butte as a materials source instead of Woodruff Butte.

50. Hennessy Butte was owned by the State of Arizona and had been closed for environmental reasons.

Following or in conjunction with the events at the Partnering Workshop described in paragraph 47, ADOT reopened Hennessy Butte for mining. This allegation is likely to have evidentiary support after reasonable opportunity for further investigation and discovery.

51. Hennessy Butte was listed as the primary source of material for an ADOT paving project east of Holbrook. FNF Construction Company ("FNF") was prime contractor on that project. At the May 11, 1992 Partnering Workshop described in paragraph 47, or another such workshop at around the same time, FNF employee Matt Gully expressed concern that Hennessy Butte might run out of aggregate before the project was completed. He suggested Woodruff Butte as an alternate. ADOT engineers stated that any bid involving Woodruff Butte would be rejected, regardless of Cholla's commercial source number status.

52. In early 1996, FNF Construction chose Woodruff Butte, through Cholla, for its material source on another project at Perkins Valley on Interstate 40. The project was close to Woodruff Butte. Cholla accordingly allowed FNF to set up its own operations at the Butte in return for paying Cholla royalties on the tonnage of aggregate extracted.

53. FNF's mining and processing operation, like all mining and processing of materials from Woodruff Butte, required use of the haul road to and from the Butte. At that time, a short section of the haul road from the Butte – approximately two hundred yards or less – crossed the corner of adjacent BLM land.

54. In May, 1996, the BLM "closed" the parcel of BLM land adjacent to Woodruff Butte that the haul road crossed. The BLM closure thus threatened to block use of

the Butte for the Perkins Valley project and for any other project.

55. The BLM closure notice expressly acknowledged that the closed BLM lands were "adjacent to private lands commonly referred to as Woodruff Butte"; that the BLM considered Woodruff Butte "an area of traditional religious significance" to Hopi, Zuni and Navajo; that Woodruff Butte was being mined; that "existing access to" the mining area "involves crossing of" the closed BLM lands; and that "the purpose of th[e] closure order is to allow the BLM to consider granting access to these private lands."

56. The BLM's closure of the land was for the express purpose of stopping mining of Woodruff Butte and for the express reason that the Butte is purportedly considered sacred by several Indian tribes.

57. Before learning the location of the land or the purpose of the closure, however, an unnamed BLM official told Cholla that obtaining a permit to cross the land would be a simple matter of submitting a short application and paying a nominal fee.

58. When the BLM official learned that the closure involved Woodruff Butte, he told Cholla that there was no way a permit to cross the BLM land could be granted.

59. Lacking other viable alternatives, Cholla, along with FNF Construction and Citizens Utility, which has transmitting equipment atop Woodruff Butte, paid $18,000 for an easement across adjacent private land. The easement allowed them to go around the closed BLM land, obviating the need for a permit to cross BLM land. Mining of the Butte, therefore, continued.

60. After the BLM's closure of the haul road failed to stop mining of Woodruff Butte, ADOT simply paid FNF Construction to stop using the Butte.

61. Specifically, on December 16, 1996, ADOT issued a change order for the Perkins Valley paving project. The change order stated:

> [FNF Construction] arranged to use material from Pit number CM0280 (Woodruff Butte), a commercial source. After operations to mine this source were started, there began complaints from concerned citizens as to destruction of this landmark. . . . The contractor was ordered to stop the mining . . . by a Federal court order and they (sic) then moved to commercial Pit number MS5588 (Hennessey Butte) owned by the State Land Department.

Accordingly, the change order reimbursed FNF for monies allegedly lost by FNF in the transaction: at least $284,750.00.

62. ADOT did not remunerate Cholla for revenues lost when FNF closed down its operations on Woodruff Butte.

63. Throughout much of the 1990s, ADOT inserted special contract provisions into specifications for projects near Woodruff Butte. The following has been in use since 1998:

> The contractor shall insure that use of any material source is in compliance with all applicable historic preservation and environmental laws and regulations, including Section 106 of the National Historic Preservation Act, which may

> serve to limit or prevent the use of materials for the site.
>
> The Woodruff Butte materials site has been the subject of claims by the Hopi, Navajo, and Zuni tribes that the site is of national historic and cultural significance per Section 106 of the National Historic Preservation Act. During a previous project, the contractor intended to use Woodruff Butte as a materials source. The Hopi Tribe filed a lawsuit in Federal District Court requesting an injunction prohibiting the use of Woodruff Butte on the project. (*Hopi Tribe v. Federal Highway Administration, et al.*) The lawsuit was voluntarily dismissed, but the project was completed using another materials site.
>
> Information concerning historical or cultural preservation issues in the area can be obtained from the following: [Hopi, Navajo, and Zuni representatives].

MATLSTE, 03/13/1998. A similar, provision was in use by May, 1997.

64. On May 20, 1998, a project involving the Holbrook Traffic Interchange (interstate entrance and exit ramps, including bridges over the local road) was approved and awarded to Vastco, Inc. as prime contractor ("Vastco"). Vastco selected Cholla and Woodruff Butte for the materials subcontract.

65. The Hopi filed a lawsuit in the United States District Court for the District of Arizona, *Hopi Tribe v. Federal Highway Administration, et al.*, no. CIV 98-1061-PCT-EHC, in an effort to ensure the Hopi would be consulted under Section 106 of the National Historic

Preservation Act before Woodruff Butte could be used a materials source for the Holbrook Traffic Interchange.

66. The Court in *Hopi Tribe v. Federal Highway Administration* awarded the Hopi a temporary restraining order, later converted to a preliminary injunction, mandating Section 106 consultation with the Hopi before federal funds could be used for the Holbrook Traffic Interchange project.

67. The project continued without the use of federal funds, however, so Vastco continued to use the Butte as a materials source until the Holbrook Traffic Interchange project was completed.

68. In June 2002, the Hopi Tribe voluntarily dismissed its Complaint in *Hopi Tribe v. Federal Highway Administration.*

69. In December 1998, while the Complaint in *Hopi Tribe v. Federal Highway Administration* was pending, USDOT officials met with officials of the national Advisory Council on Historic Preservation ("ACHP") regarding ACHP's concerns about use of Woodruff Butte as a materials source. ACHP suggested in that meeting that Arizona adopt a contract specification to require that if alleged religious impacts cannot be mitigated completely, then Woodruff Butte cannot be approved for use as a materials source site.

70. The recommendation by ACHP described in paragraph 69 above was communicated to ADOT. This allegation is likely to have evidentiary support after reasonable opportunity for further investigation and discovery.

71. Accordingly, in mid-1999 ADOT announced new commercial source regulations. Under the new regulations, all existing commercial source numbers would expire at the end of 1999. Thereafter, commercial source numbers were still necessary but could be obtained only if the applicant submitted an environmental assessment ("EA") that considered impacts to places that are eligible for the National Registry of History Places, such as Woodruff Butte.

72. These new commercial source regulations are set forth in Sections 104.12, 1001-2, and 1001-4.01 of the ADOT Standard Specifications for Road and Bridge Construction (2000) ("the challenged regulations").

73. Under the challenged regulations, if ADOT determines from the EA that adverse impacts to sites eligible for – but not necessarily listed on – the National Register of Historic Places – cannot be mitigated or avoided, the commercial source number application must be denied.

74. Consultations between ADOT and FHWA regarding drafting of the challenged regulations indicates ADOT's specific intent in promulgating the challenged regulations was to prevent future use of Woodruff Butte as a materials source.

75. Cholla applied for a new commercial source number under the challenged regulations, hiring SWCA Environmental Consultants of Flagstaff, Arizona, to perform the necessary "cultural" analysis.

76. EAs drafted by SWCA are accepted routinely by ADOT without call for serious revision. Cholla's, however, was not.

77. On November 17, 1999, Defendant Anderson of ADOT wrote to Cholla identifying three deficiencies in the Environmental Compliance Checklist for Woodruff Butte. Defendant Anderson explained that Cholla's EA lacked certain information on effects to endangered species, lacked a stormwater pollution prevention plan, and "[b]ased on the Historic Preservation Team's cursory review, the summary provided by SWCA regarding historic preservation is lacking sufficient information and background research."

78. In support of his assertion that Cholla's EA took insufficient account of historic preservation, Defendant Anderson provided a copy of a January 6, 1997, letter from the Arizona State Historic Preservation Officer to Cholla. That letter provides:

> Woodruff Butte . . . was determined, by our office in 1990, to be eligible for the National Register of Historic Places as a Traditional Cultural Property important in the history, cultural and religious practices and beliefs of at least three Native American tribes. . . . The property was eligible. . . . *primarily because of* its association with the migration and creation histories of the tribes . . . the cultural practices of the tribes . . . and *the association with important deities in Hopi, Zuni and Navajo religion.* The Butte is an important cultural landmark for the tribes and has been a place of extreme importance in medicinal plant collection and religious practices for centuries.

(Emphasis added.)

79. Cholla continued to pay SWCA for several rounds of revisions of the EA. Ultimately, SWCA performed and

submitted a cultural resources assessment on Cholla's behalf dated March 13, 2000.

80. SWCA concluded that mining the Butte would adversely affect an historic property because Woodruff Butte, allegedly, is of religious significance to several Indian tribes and mining would unavoidably alter the Butte.

81. On June 16, 2000, ADOT explained, by letter to Cholla, that the deficiencies in the cultural assessment having been resolved, ADOT had submitted the assessment to the Arizona SHPO and to the Tribes for review.

82. The Tribes concurred that Woodruff Butte is of religious significance to them. The Navajo, more particularly, "agree[d] with the assessments of eligibility . . . for the generalized sacred site encompassing [Woodruff] Butte itself." The Hopi pointed out that their "priests were terribly concerned" as the Butte "housed . . . nine major shrines. . . ."

83. On June 26, 2000, Defendant Duarte, Manager of ADOT's Environmental Planning Section, informed Cholla by letter that Cholla's application for a commercial source number had been rejected. Defendant Duarte expressly stated that the rejection was based on the SWCA report and the SHPO's and Indians' concurrence with that report.

84. Rejection of Cholla's commercial source number application, therefore, was based solely or at least primarily on the purported religious significance of Woodruff Butte.

85. All Defendants currently participate and/or have participated in the formulation, implementation, and/or

enforcement of a policy against the use of Woodruff Butte as a materials source for road and bridge construction in Arizona because of Woodruff Butte's religious significance as a sacred site to American Indians.

First Claim For Relief
(Establishment of Religion – United States Constitution)

86. Cholla repeats and incorporates by reference all the allegations of paragraphs 1 through 85 as if fully set forth herein.

87. The First Amendment to the United States Constitution provides that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof[.]" The First Amendment is applicable to the States pursuant to the Fourteenth Amendment to the United States Constitution.

88. Defendants maintain a policy against the use of Woodruff Butte as a materials source.

89. The reason for this policy is that Defendants believe Woodruff Butte is considered sacred by the Hopi, Zuni, and/or Navajo Indian Tribes based on religious grounds.

90. ADOT actively maintains a policy and has implemented this policy against use of Woodruff Butte by first promulgating, then subsequently enforcing the challenged regulations against Cholla.

91. The purpose of the challenged regulations, Defendants' policy, and the denial of Cholla's application for a commercial source number is not secular. It is in fact based on specific religious grounds.

92. The principle and/or primary effect of the challenged regulations, Defendants' policy, and the denial of Cholla's application for a commercial source number is the advancement and/or protection of religion.

93. The challenged regulations, Defendants' policy, and the denial of Cholla's application for a commercial source number foster an excessive governmental entanglement with religion.

94. The challenged regulations, Defendants' policy, and the denial of Cholla's application for a commercial source number, together and separately, constitute governmental endorsement of religion pursuant to the beliefs and practices of Hopi, Zuni, and/or Navajo Indian Tribes.

95. As a direct result of the challenged regulations and Defendants' formulation, implementation, and enforcement of their policy, Cholla is unable to bid for and/or win materials subcontracts for ADOT highway construction contracts. The effect of this direct result violates Cholla's rights against establishment of religion under the First Amendment to the United States Constitution.

96. The challenged regulations, Defendants' policy, and the denial of Cholla's application for a commercial source number, together and separately, violate Cholla's rights against establishment of religion under the First Amendment to the United States Constitution.

97. Cholla has incurred and will continue to incur attorneys fees and litigation expenses in prosecuting this action to redress its rights under this provision of the United States Constitution.

98. Cholla has no fully adequate remedy at law.

Second Claim for Relief
(Establishment of Religion – Arizona Constitution)

99. Cholla repeats and incorporates by reference all the allegations of paragraphs 1 through 98 as if fully set forth herein.

100. Article 2, Section 12 of the Arizona Constitution provides that "[n]o public money or property shall be appropriated for or applied to any religious worship, exercise, or instruction, or to the support of any religious establishment."

101. Article 20, Section 1 of the Arizona Constitution provides that "[p]erfect toleration of religious sentiment shall be secured to every inhabitant of this state, and no inhabitant of this state shall ever be molested in person or property on account of his or her mode of religious worship, or lack of the same."

102. Defendants maintain a policy against the use of Woodruff Butte as a materials source.

103. The reason for this policy is that Defendants believe Woodruff Butte is considered sacred by the Hopi, Zuni, and/or Navajo Indian Tribes based on religious grounds.

104. ADOT actively maintains a policy and has implemented this policy against use of Woodruff Butte by first promulgating, then subsequently enforcing the challenged regulations against Cholla.

105. The purpose of the challenged regulations, Defendants' policy, and the denial of Cholla's application for a commercial source number is in fact based on specific religious grounds.

106. The principle and/or primary effect of the challenged regulations, Defendants' policy, and the denial of Cholla's application for a commercial source number is the advancement and/or protection of religion.

107. Public money and/or property is appropriated for and applied to the religious worship, exercise, or instruction, and/or to the support of the establishment of religion pursuant to beliefs and practices of Hopi, Zuni, and/or Navajo Indian Tribes.

108. As a direct result of the challenged regulations and Defendants' formulation, implementation, and enforcement of their policy, Cholla is unable to bid for and/or win materials subcontracts for ADOT highway construction contracts. The effect of this direct result violates Cholla's rights against establishment of religion and right to toleration of religious sentiment under Article 2, Section 12 and Article 20, Section 1 of the Arizona Constitution.

109. The challenged regulations, Defendants' policy, and the denial of Cholla's application for a commercial source number, together and separately, violate Cholla's rights against establishment of religion and right to toleration of religious sentiment under Article 2, Section 12 and Article 20, Section 1 of the Arizona Constitution.

110. Cholla has no fully adequate remedy at law.

Third Claim for Relief
(Special Laws – Arizona Constitution)

111. Cholla repeats and incorporates by reference all the allegations of paragraphs 1 through 110 as if fully set forth herein.

112. Article 4, Section 19 of the Arizona Constitution provides that no local or special laws are to be enacted "[g]ranting to any corporation, association, or individual, any special or exclusive privileges, immunities, or franchises."

113. The challenged regulations, Defendants' policy, and the denial of Cholla's application for a commercial source number, together and separately, discriminate against Cholla in favor of the Navajo, Hopi, and Zuni Indian Tribes.

114. The challenged regulations, Defendants' policy, and the denial of Cholla's application for a commercial source number, together and separately, impose restrictions on particular places, persons and things, namely, to Woodruff Butte and Cholla Ready Mix, Inc.

115. The challenged regulations, Defendants' policy, and the denial of Cholla's application for a commercial source number, together and separately, illegitimately classify by religion and race, not population, geography, or time limitations.

116. The challenged regulations, Defendants' policy, and the denial of Cholla's application for a commercial source number, together and separately, do not permit other individuals or entities to come within the benefited class.

117. The classification inherent in the challenged regulations, Defendants' policy, and the denial of Cholla's application for a commercial source number, together and separately, do not encompass all members of the relevant class; nor do they permit members to move into and out of the class.

118. The challenged regulations, Defendants' policy, and the denial of Cholla's application for a commercial source number, together and separately, represent "special laws" granting special or exclusive privileges and/or immunities in favor of the Navajo, Hopi, and Zuni Indian Tribes. These same special or exclusive privileges and/or immunities are not available to Cholla or those similarly situated.

119. The challenged regulations, Defendants' policy in formulating, implementing, and enforcing such regulations, and the denial of Cholla's application for a commercial source number, together and separately, violate Cholla's right against the application of "special laws" under Article 4, Section 19 of the Arizona Constitution.

120. Cholla has no fully adequate remedy at law.

Fourth Claim for Relief
(42 U.S.C. § 1981)

121. Cholla repeats and incorporates by reference all the allegations of paragraphs 1 through 120 as if fully set forth herein.

122. 42 U.S.C. § 1981 provides that "[a]ll persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts," which includes "the making, performance, modification, and termination of contracts, and the enjoyment of all benefits, privileges, terms, and conditions of the contractual relationship."

123. The challenged regulations, Defendants' policy, and the denial of Cholla's application for a commercial source number, together and separately, have acted in the past, in

the present, and in the future to deny Cholla the right to contract freely for the commercial use of Woodruff Butte.

124. The challenged regulations, Defendants' policy, and the denial of Cholla's application for a commercial source number, together and separately, discriminate against Cholla, and its ability to contract, in favor of the Navajo, Hopi, and Zuni Indian Tribes.

125. Federal and State Defendants named herein directed, participated in, and/or had knowledge of the actions, challenged regulations, subsequent policy, and/or the denial of Cholla's application for a commercial source number, which deprived Cholla of its rights under 42 U.S.C. § 1981.

126. The challenged regulations, Defendants' policy, and the denial of Cholla's application for a commercial source number, together and separately, acted to discriminate against Cholla's right to make and enforce contracts and to the full and equal benefit and privilege of all laws and proceedings for the security of persons and property.

127. The challenged regulations, Defendants' policy, and the denial of Cholla's application for a commercial source number, together and separately, deny Cholla equal rights under the law pursuant to 42 U.S.C. § 1981.

128. Cholla has no fully adequate remedy at law.

Fifth Claim for Relief
(42 U.S.C. § 1983)

129. Cholla repeats and incorporates by reference all the allegations of paragraphs 1 through 128 as if fully set forth herein.

130. 42 U.S.C. § 1983 provides that "[e]very person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law[.]"

131. The challenged regulations, Defendants' policy, and the denial of Cholla's application for a commercial source number, together and separately, discriminate against Cholla in favor of the Navajo, Hopi, and Zuni Indian Tribes.

132. Defendants actions, the challenged regulations, Defendants' policy, and the denial of Cholla's application for a commercial source number, together and separately, violate: Cholla's rights against the establishment of religion under the First Amendment; the toleration of religious sentiment under Article 2, Section 12 and Article 20, Section 1 of the Arizona Constitution; the application of "special laws" under Article 4, Section 19 of the Arizona Constitution; the deprivation of equal rights under 42 U.S.C. § 1981; and the prohibition against exclusion from participation in, denial of benefits of, and discrimination under federally assisted programs under 42 U.S.C. § 2000d.

133. Federal and State Defendants named herein directed, participated in, and/or had knowledge of the actions, challenged regulations, subsequent policy, and/or the denial of Cholla's application for a commercial source

number, which deprived Cholla of its rights under 42 U.S.C. § 1983.

134. The challenged regulations, Defendants' policy, and the denial of Cholla's application for a commercial source number, together and separately, have deprived Cholla of the rights, privileges, and immunities secured by the Constitution and the laws of the United States and the Constitution and laws of the State of Arizona.

135. The challenged regulations, Defendants' policy, and the denial of Cholla's application for a commercial source number, together and separately, act as a deprivation of Cholla's rights under 42 U.S.C. § 1983.

136. Cholla has no fully adequate remedy at law.

Sixth Claim for Relief
(42 U.S.C. § 2000d)

137. Cholla repeats and incorporates by reference all the allegations of paragraphs 1 through 136 as if fully set forth herein.

138. 42 U.S.C. § 2000d provides that "[n]o person in the United States shall, on the ground or race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance."

139. The State of Arizona, ADOT, the Arizona State Historic Preservation Office, and the Arizona Parks Department, are recipients of federal financial assistance.

140. The challenged regulations, Defendants' policy, and the denial of Cholla's application for a commercial

source number, together and separately, discriminate against Cholla in favor of the Navajo, Hopi, and Zuni Indian Tribes.

141. The challenged regulations, Defendants' policy, and the denial of Cholla's application for a commercial source number, together and separately, deny Cholla the use of its property, Woodruff Butte, because Cholla is not affiliated with and refuses to recognize or to adhere to certain religious practices of the Navajo, Hopi, and Zuni Indian Tribes.

142. The challenged regulations, Defendants' policy, and the denial of Cholla's application for a commercial source number, together and separately, have denied and continue to deny Cholla of the benefits of the commercial use of Woodruff Butte through the ADOT commercial source process and through ADOT's Standard Specifications for Road and Bridge Construction (2000).

143. Federal and State Defendants named herein directed, participated in, and/or had knowledge of the actions, challenged regulations, subsequent policy, and/or the denial of Cholla's application for a commercial source number, which deprived Cholla of its rights under 42 U.S.C. § 2000d.

144. The challenged regulations, Defendants' policy, and the denial of Cholla's application for a commercial source number, together and separately, discriminate against Cholla based on race, color, and national origin, and have resulted in the denial of Cholla's rights, privileges, and immunities secured by equal protection protections under the Constitution and the laws of United States and the Constitution and laws of the State of Arizona.

145. The challenged regulations, Defendants' policy, and the denial of Cholla's application for a commercial source number, together and separately, violate Cholla's right to prohibition against exclusion from participating in, denial of benefits of, and discrimination under federally assisted programs under 42 U.S.C. § 2000d.

146. Cholla has no fully adequate remedy at law.

Prayer for Relief

WHEREFORE, Cholla Ready Mix, Inc. respectfully requests that this Court enter a judgment for Cholla Ready Mix, Inc. and against Defendants, awarding the following relief:

1. A declaration that the challenged regulations violate Cholla's rights against establishment of religion under the First Amendment to the United States Constitution;

2. A declaration that the formulation, implementation, and enforcement of Defendants' policy violate Cholla's rights against establishment of religion under the First Amendment to the United States Constitution;

3. A declaration that denial of Cholla's application for a commercial source number violates Cholla's rights against establishment of religion under the First Amendment to the United States Constitution;

4. A declaration that the challenged regulations violate Cholla's rights against establishment of religion and right to toleration of religious sentiment under Article 2, Section 12 and/or Article 20, Section 1 of the Arizona Constitution;

5. A declaration that the formulation, implementation, and enforcement of Defendants' policy violate Cholla's rights against establishment of religion and right to toleration of religious sentiment under Article 2, Section 12 and/or Article 20, Section 1 of the Arizona Constitution;

6. A declaration that denial of Cholla's application for a commercial source number violates Cholla's rights against establishment of religion and toleration of religious sentiment under Article 2, Section 12 and/or Article 20, Section 1 of the Arizona Constitution;

7. A declaration that the challenged regulations violate Cholla's right against the application of "special laws" under Article 4, Section 19 of the Arizona Constitution;

8. A declaration that the formulation, implementation, and enforcement of Defendants' policy violate Cholla's right against the application of "special laws" under Article 4, Section 19 of the Arizona Constitution;

9. A declaration that the challenged regulations deny Cholla equal rights under the law pursuant to 42 U.S.C. § 1981;

10. A declaration that the formulation, implementation, and enforcement of Defendants' policy deny Cholla equal rights under the law pursuant to 42 U.S.C. § 1981;

11. A declaration that the denial of Cholla's application for a commercial source number denies Cholla equal rights under the law pursuant to 42 U.S.C. § 1981;

12. A declaration that the challenged regulations violate Cholla's right against the deprivation of rights under 42 U.S.C. § 1983;

13. A declaration that the formulation, implementation, and enforcement of Defendants' policy violate Cholla's right against the deprivation of rights under 42 U.S.C. § 1983;

14. A declaration that the denial of Cholla's application for a commercial source number violates Cholla's right against the deprivation of rights under 42 U.S.C. § 1983;

15. A declaration that the challenged regulations violate Cholla's right against exclusion from participation in, denial of benefits of, and discrimination under Federally assisted programs under 42 U.S.C. § 2000d;

16. A declaration that the formulation, implementation, and enforcement of Defendants' policy violate Cholla's right against exclusion from participation in, denial of benefits of, and discrimination under Federally assisted programs under 42 U.S.C. § 2000d;

17. A declaration that the denial of Cholla's application for a commercial source number violates Cholla's right against exclusion from participation in, denial of benefits of, and discrimination under Federally assisted programs under 42 U.S.C. § 2000d;

18. An injunction barring any implementation or enforcement of the challenged regulations and Defendants' policy in any manner that considers religion in granting or denying commercial source number applications in violation of Cholla's rights under the First Amendment of the United States Constitution and/or Article 2, Section 12 and/or Article 20, Section 1 of the Arizona Constitution generally;

19. An injunction barring any implementation or enforcement of the challenged regulations and Defendants'

policy as to Cholla in any manner that considers religion in granting or denying any application by Cholla for a commercial source number in violation of Cholla's rights the First Amendment of the United States Constitution and/or Article 2, Section 12 and/or Article 20, Section 1 of the Arizona Constitution;

20. An injunction directing Defendants to grant Cholla a commercial source number;

21. An injunction barring any implementation or enforcement of the challenged regulations and Defendants' policy in any manner that violates rights against the application of "special laws" under Article 4, Section 19 of the Arizona Constitution generally;

22. An injunction barring any implementation or enforcement of the challenged regulations and Defendants' policy against Cholla in any manner that violates Cholla's rights against the application of "special laws" under Article 4, Section 19 of the Arizona Constitution;

23. An injunction barring any implementation or enforcement of the challenged regulations and Defendants' policy in any manner that violates rights to equal protection of the law and against the deprivation of rights under 42 U.S.C. §§ 1981, 1983, and 2000d generally;

24. An injunction barring any implementation or enforcement of the challenged regulations and Defendants' policy against Cholla in any manner that violates Cholla's right to equal protection of the law and against the deprivation of rights under 42 U.S.C. §§ 1981, 1983, and 2000d;

25. An award, paid to Cholla, and against Defendants, of damages available under 42 U.S.C. §§1981 and 2000d.

26. An award to Cholla of its costs, attorneys fees, and litigation expenses in accordance with laws of the United States and the State of Arizona, including, but not limited to, 42 U.S.C. § 1988 and/or the Equal Access to Justice Act, 28 U.S.C. § 2412; and

27. An award to Cholla of such other and further relief that this Court may deem appropriate and just.

Dated this 29 day of January, 2003.

Respectfully Submitted by:

/s/ Christopher T. Massey
William Perry Pendley
Christopher T. Massey
Mountain States Legal Foundation
2596 South Lewis Way
Lakewood, Colorado 80227
Tel: 303-292-2021 x16
Fax: 303-292-1980
Attorneys for Plaintiff

Norman D. James
Arizona Bar. No. 006901
FENNEMORE CRAIG, PC
3003 North Central Avenue,
Suite 2600
Phoenix, Arizona 85012-2913
Tel: 602-916-5000
Fax: 602-916-5999
Local Counsel for Plaintiff

(2)

No. 04-952

Supreme Court, U.S.
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In The
Supreme Court of the United States

CHOLLA READY MIX, INC.,

Petitioner,

v.

VICTOR MENDEZ, Secretary of the Arizona Department of Transportation (ADOT); JEFF SWAN, ADOT Holbrook District Engineer; WILLIAM BELT, ADOT Environmental Planning Services Department; THOR ANDERSON, ADOT Official; RICHARD DUARTE, ADOT Environmental Planning Section Manager; BETTINA ROSENBERG, ADOT Historic Preservation Coordinator; JAMES GARRISON, Arizona State Historic Preservation Officer; and ROBERT GASSER, Arizona Parks Department Compliance Officer,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

TERRY GODDARD
Arizona Attorney General

DANIEL P. SCHAACK*
JOE ACOSTA, JR.
CARRIE J. BRENNAN
Assistant Attorneys General
OFFICE OF THE ATTORNEY GENERAL
1275 W. Washington
Phoenix, Arizona 85007
(602) 542-7659
Attorneys for Respondents

**Counsel of Record*

COCKLE LAW BRIEF PRINTING CO (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTIONS PRESENTED

1. A rule of the Arizona Department of Transportation prohibits it from buying materials for highway-construction projects if extracting those materials would adversely affect historically and culturally significant sites. Did the Department violate the Establishment Clause when it applied that rule to a materials site that has cultural and historic – as well as religious – significance?

2. Cholla alleged facts establishing that ADOT refused to purchase materials from Woodruff Butte because that site has cultural and historic – as well as religious – significance. Accepting the truth of those facts, did the Ninth Circuit properly affirm dismissal of the suit – or did it improperly impose a higher pleading standard – when it held that the Department's actions, as alleged, did not violate the Establishment Clause?

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RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

The Respondents request the Court to deny Cholla Ready Mix, Inc.'s Petition for Certiorari seeking review of the opinion of the United States Court of Appeals for the Ninth Circuit.

This case concerns Cholla's challenge to the Arizona Department of Transportation's determination that in state highway-construction projects it would not use materials from Cholla's property, Woodruff Butte. ADOT's determination was based on its rule that prohibits it from using materials for construction projects if using them "will have major adverse impact on cultural or historic resources." (ADOT Standard Specifications for Road and Bridge Construction § 1001-4.01(c) [Pet. App. 40-42].) Cholla challenged that decision, claiming that Woodruff Butte's religious significance to the Hopi, Navajo, and Zuni Tribes tainted ADOT's decision not to participate in the butte's destruction, even though the site has historic and cultural significance apart from its religious significance to the Tribes.

The Ninth Circuit correctly rejected Cholla's challenge. Its opinion is consistent with this Court's Establishment Clause jurisprudence and is not inconsistent with any other authority that Cholla has cited.

In deciding whether to grant certiorari, the Court should note that, contrary to Cholla's repeated assertions (Pet. at i, 7, 8, 10, 18, 19), the rule does not bar Cholla – or any other property owner – from using its property as it sees fit. It applies only to ADOT, prohibiting it from

purchasing materials from sources when so doing would adversely affect historically or culturally significant sites.

STATEMENT OF THE CASE

An ADOT contract specification ("the rule") ensures that ADOT, in obtaining materials to build highways, will not participate in the destruction of cultural or historic sites: "If the Department determines that the proposed use will have major adverse impact on cultural or historic resources, the Department will not allow the use of the source." Pet. App. 40-41.

As noted in Cholla's First Amended Complaint, the Arizona State Historic Preservation Office (SHPO) found Woodruff Butte eligible for listing in the National Register of Historic Places for its historic, cultural, *and* religious significance. Pet. App. 66, ¶ 78. In a 1997 letter to Cholla, the SHPO stated:

> Woodruff Butte . . . was determined, by our office in 1990, to be eligible for the National Register of Historic Places as a Traditional Cultural Property important in the history, cultural and religious practices and beliefs of at least three Native American tribes. . . . The property was eligible . . . primarily because of its association with the migration and creation histories of the tribes . . . the cultural practices of the tribes . . . and the association with important deities in Hopi, Zuni and Navajo religion. The Butte is an important cultural landmark for the tribes and has been a place of extreme importance in medicinal plant collection and religious practices for centuries.

Id. (Cholla's emphases removed). The rule requires an applicant for an Arizona commercial-source number to obtain an environmental impact assessment certifying that use of the applicant's source will not have an adverse cultural or historic impact. Pet. App. 39-41. In compliance with the rule, Cholla retained an expert to prepare an environmental assessment. Pet. App. 65. He found that mining the butte would "adversely affect an historic property." *Id.* at 67, ¶ 80. Based on the expert's report, as well as consultation with the Tribes, ADOT rejected Cholla's application for a commercial-source number for the butte, finding that mining it would have an adverse impact on cultural and historic resources. Pet. App. 67, ¶ 83.

Cholla sued in the United States District Court, alleging that ADOT's actions violate the Establishment Clause because the rejection of Woodruff Butte was based "solely or at least primarily on the purported religious significance of Woodruff Butte." Pet. App. 67, ¶ 84. The district court dismissed Cholla's Amended Complaint. Pet. App. 16. The Ninth Circuit affirmed. Pet. App. 1 (reported at 382 F.3d 969 (9th Cir. 2004).)

THE COURT SHOULD DENY THE PETITION

Cholla urges this Court to grant certiorari for two reasons. First, it claims that ADOT violated the Establishment Clause by rejecting Cholla's application based "solely or at least primarily on the purported religious significance of Woodruff Butte." Pet. App. 67, ¶ 84. It contends that the court of appeals' opinion conflicts with Establishment Clause decisions from this Court and

other circuits. Pet. at 5-12. Second, it urges the Court to take the Ninth Circuit to task for supposedly having imposed a heightened pleading standard contrary to Civil Rule 8(a) and for supposedly having assumed facts not in the record. Pet. at 12-22. Neither argument is valid. The Ninth Circuit's opinion does not stray from established precedents, and the court did not hold Cholla to a heightened pleading standard or assume facts outside the record.

I. The Court of Appeals Correctly Ruled that Cholla Failed to State a Claim that ADOT Violated the Establishment Clause.

A. Cholla Fails to Show that the Court's Opinion Is Inconsistent with Applicable Precedents.

One of the factors that this Court considers in deciding whether to grant certiorari is whether the decision is "in conflict with the decision of another United States Court of Appeals on the same important matter." Sup. Ct. R. 10(a). Cholla asserts that the Ninth Circuit's opinion is inconsistent with decisions from this Court and other courts. Pet. at 6-9. But it does not prove that assertion. It cites no analogous case that reaches a different conclusion and cites no case that states a different rule of law. Simply put, it has not identified any conflict.

Cholla's arguments boil down to an assertion that the Ninth Circuit failed to properly apply Establishment Clause principles, especially the test of *Lemon v. Kurtzman*, 403 U.S. 602 (1971). This argument lacks merit, as the next subsection demonstrates. But even if it were true, it would not make this case appropriate for this Court's review because "[a] petition for writ of certiorari is rarely

granted when the asserted error consists of the misapplication of a properly stated rule of law." Sup. Ct. R. 10.

B. The Court Properly Applied the *Lemon* Test.

Lemon held that a government action passes muster under the Establishment Clause if it (1) has a secular purpose, (2) does not have the principal or primary effect of advancing religion, and (3) does not foster an excessive entanglement with religion. *Lemon*, 403 U.S. at 612-13.

1. ADOT had a secular purpose in adopting the rule and applying it to Woodruff Butte.

The Ninth Circuit held that, aside from any incidental impact on religion, ADOT's adopting the rule and applying it to Woodruff Butte had the obvious secular purpose of protecting historic and cultural resources:

> It is clear from Cholla's complaint that defendants' actions have the secular purpose of carrying out state construction projects in a manner that does not harm a site of religious, historical, and cultural importance to several Native American groups and the nation as a whole.
>
> . . . Cholla has alleged no facts that would support a conclusion that the state defendants were not motivated at least in part by this secular purpose.

Pet. App. 9. The SHPO found Woodruff Butte eligible for inclusion on the National Register not only because of its religious significance, but also because of its association with the Tribes' migration and creation histories, cultural practices, and medicinal-plant collection. Pet. App. 66,

¶ 78. Although Cholla asserts that the opinion is inconsistent with precedent, it points to no case that reaches a contrary conclusion.

Unable to attack the rule's unmistakably secular purpose, Cholla argues that a *secondary* rationale of the Ninth Circuit – accommodation of religion – cannot properly justify the rule under the secular-purpose prong. Pet. at 6. But in so doing, it misrepresents the Ninth Circuit's holding. The court reached its main conclusion – that the rule had the obvious secular purpose of protecting historic and cultural resources – without referring to accommodation. Pet. App. 9. And Cholla's argument on this point is misleading. It argues that "the Ninth Circuit cites no legal precedent holding that a 'secular purpose' is served when governments bar people from using their private property 'to accommodate' (or to avoid interference with) religious groups." Pet. at 7. But the rule does not prevent Cholla from using its property; it operates only on ADOT, preventing it from buying materials extracted from historically and culturally important sites and thereby keeping ADOT from participating in their destruction. *Cf. Harris v. McRae*, 448 U.S. 297, 319 (1980) (statute does not violate the Establishment Clause merely because it coincides or harmonizes with the tenets of some or all religions).

2. The primary effect of applying the rule to Woodruff Butte was not the advancement of religion.

The second inquiry is whether the primary effect of ADOT's actions was to advance religion. *Lemon*, 403 U.S. at 612. As the Ninth Circuit recognized, the rule's primary effect is not to advance religion; rather, it is to prevent ADOT from using materials in state construction projects

if doing so will contribute to the destruction of historic or cultural sites. Pet. App. 11. Moreover, a given site's religious significance does not eliminate its historic or cultural importance, a point the court demonstrated by referring to numerous locations around the world that are historic but have (or at one time had) religious connotations. Pet. App. 10-11. A prime example is the Parthenon, which unquestionably has historic value but was also a temple of worship for the Greeks. *Id.* at 10. The court also noted several other Judeo-Christian religious sites that are listed on the National Register. *Id.* As the Ninth Circuit held:

> The complaint's descriptions of the controversy and litigation over the land; the cultural and historic importance of Woodruff Butte in addition to its religious significance; and the Arizona State Historic Preservation Officer's conclusion that the Butte is an 'important cultural landmark' are inconsistent with Cholla's claim that advancing religion is the principal or primary effect of Defendants' actions.

Id. at 10. States can protect sites with historic and cultural – as well as religious – significance without being guilty of advancing religion in violation of the Establishment Clause.

Cholla argues that the Ninth Circuit ignored the importance of governmental neutrality in religion cases. Pet. at 7-8. This ignores a central holding in the court's opinion: the rule does not constitute an endorsement of the Tribes' religions: "There is no suggestion that the state defendants favor tribal religion over other religions or that they would not protect sites of historical, cultural, and religious importance to other groups." Pet. App. 11. Cholla

does not, cannot, point to anything in the record to the contrary.

This case is distinguishable from others that consider whether the display of religious symbols amounted to governmental endorsement of religion. *See Allegheny County v. ACLU Greater Pittsburgh Chapter*, 492 U.S. 573 (1989); *Lynch v. Donnelly*, 465 U.S. 668 (1984). ADOT erected no monument to any religion or to religion in general. It simply decided not to purchase materials from a source because extracting those materials would contribute to the destruction of a historic or cultural site. Thus, unlike *Allegheny County* and *Lynch*, there is no government-sponsored public display at issue. ADOT's actions cannot be seen as endorsing one or more of the Tribes' religions under the analyses in *Allegheny County* and *Lynch*.

3. Applying the rule to Woodruff Butte did not excessively entangle ADOT with religion.

As the Ninth Circuit acknowledged, some level of interaction between government and religious communities is inevitable; entanglement must be excessive to violate the Establishment Clause. Pet. App. 12 (citing *Agostini v. Felton*, 521 U.S. 203, 233 (1997)). This Court looks to the character and purpose of the institutions benefited and the nature of the interaction. *See Bowen v. Kendrick*, 487 U.S. 589, 615-16 (1988).

The Ninth Circuit held that ADOT's one-time consultation with the Tribe in evaluating Cholla's application for a commercial-source number did not constitute excessive entanglement. Pet. App. 12. Insisting that this one-time

consultation constitutes excessive entanglement, Cholla contends that the Ninth Circuit erred in holding that ADOT had only "routine administrative contact" with the Hopi Tribe that did not amount to excessive entanglement. Pet. at 8, 12 (citing *Lyng v. Northwest Indian Cemetery Protective Ass'n*, 485 U.S. 439, 451-52 (1988), and *Badoni v. Higginson*, 638 F.2d 172, 179 (10th Cir. 1980)). Neither *Lyng* nor *Badoni* supports Cholla's assertion. *Lyng* involved the Free Exercise Clause; it did not discuss the Establishment Clause at all, much less the *Lemon* test's excessive-entanglement prong. 448 U.S. at 447-53. Although *Badoni* was an Establishment Clause case, its facts are nothing like this case. It concerned a request to exclude tourists from a national monument in order to aid the performance of religious ceremonies, and it held that granting such a request would violate the Establishment Clause. 638 F.2d at 179. The facts here are quite different. Unlike *Badoni* – where the requested injunction would have required the government to bar the public from public land to advance religious concerns – ADOT's rule does not require Cholla to allow the Tribes to use Woodruff Butte property for religious purposes, or for any purpose at all. It does not coerce Cholla's conduct at all. It applies only to ADOT – limiting its purchase of materials – and does so in a content-neutral, generally applicable manner.

Moreover, deciding whether Woodruff Butte has historic or cultural significance happened exactly once, without repeated or ongoing contact with the Tribes. And even if extensive and ongoing contacts had occurred, they would not have implicated the Establishment Clause. The Tribes are semi-autonomous governments, *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 142 (1980), not merely religious organizations. The Establishment Clause

does not forbid state governments from interacting with tribal governments.

Finally, specifically removing religious factors from the mix, as Cholla demanded, could have been seen as being antagonistic to religion. And as Cholla acknowledges and argues, the First Amendment demands governmental neutrality. Pet. at 7 (citing *Bd. of Educ. v. Grumet*, 512 U.S. 687, 697 (1994)).

C. Cholla's Attack on the *Lemon* Test Is Misplaced.

Cholla also argues that the *Lemon* test might not apply in this case. Pet. at 15-16. This argument lacks merit. First, Cholla specifically based its challenge to the rule on the *Lemon* test. The First Amended Complaint attacks the rule on each of the three *Lemon* factors. Pet. App. 68-69, ¶¶ 91-94. Second, Cholla has not proposed any alternative test to replace *Lemon*, much less one under which its pleading could have stated a claim. Third, the cases Cholla cites each presented specific reasons why the *Lemon* test did not apply. *See Marsh v. Chambers*, 463 U.S. 783, 788-89 (1983) (refusing to invalidate a daily legislative prayer in reliance on direct historical evidence of the Framers' contrary intent); *Lee v. Weisman*, 505 U.S. 577, 588 (1992) (invalidating graduation prayers at public schools, relying on *Engel v. Vitale*, 370 U.S. 421 (1962), a pre-*Lemon* case that clearly prohibited prayers in public schools); *Larson v. Valente*, 456 U.S. 228, 246, 252 (1982) (invalidating a statute that imposed registration and reporting requirements on certain religious organizations but not others and noting that *Lemon* does not apply to laws that discriminate among religions). Each of these

cases involved specific circumstances that controlled the decisions without reference to *Lemon*. Those circumstances do not exist in this case, and Cholla offers no reason to depart from *Lemon* here.[1]

D. The Rule Is Not Analogous to the Display of a Religious Symbol at a Public Building.

Cholla claims that the Ninth Circuit erred by not applying the analysis applicable when a religious symbol appears in a challenged government-sponsored display that contains historical or cultural features. Pet. at 9-12. But this case does not involve a government-sponsored display containing religious symbols. ADOT's decision not to participate in damaging a historic location did not endorse any religion – or religion generally.

These differences negate Cholla's attempt to tie this case to two cases involving governmental display of religious symbols that are now before this Court: *Van Orden v. Petty*, 351 F.3d 173 (5th Cir. 2003), *cert. granted*, 125 S. Ct. 346 (2004), and *ACLU of Kentucky v. McCreary County*, 354 F.3d 438 (6th Cir. 2003), *cert. granted*, 125 S. Ct. 310 (2004). Pet. at 11-12. (The Court heard arguments on these cases on March 2, 2005.) Because ADOT is

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[1] One of the issues in *McCreary County v. ACLU of Kentucky* is: "Whether the *Lemon* test should be overruled since the test is unworkable and has fostered excessive confusion in Establishment Clause jurisprudence." *McCreary County v. ACLU of Ky.*, No. 03-1693, docket, http://www.supremecourtus.gov/qp/03-01693qp.pdf. Thus, the Court need not take this case to decide whether to reject *Lemon*. And there is no reason to hold this case pending the decision in *McCreary County*, because Cholla has not offered any alternative test or shown how a different test would change the outcome.

not involved in any display with respect to Woodruff Butte, these cases are irrelevant.

II. The Court of Appeals Did Not Impose a Heightened Pleading Standard or Rely on Facts Outside the Record.

Cholla argues that the Ninth Circuit improperly dismissed the First Amended Complaint for failure to allege a prima-facie case. Pet. at 12-19. In conjunction with this argument, it asserts that the court failed to credit its allegations of fact and assumed facts that were not in the record. *Id.* at 19-22. Neither argument has merit, as the following subsections demonstrate.

A. Even if the Ninth Circuit Were Guilty of Cholla's Charges, This Case Would Not Be Worthy of Certiorari.

Even if Cholla's assertions had merit, this would not make certiorari appropriate here. Cholla argues merely that the Ninth Circuit misapplied well-established law. The Ninth Circuit did not announce that it was rejecting *Swierkiewicz v. Sorema N.A.*, 534 U.S. 506 (2002), in cases involving the Establishment Clause. Nor did it state that it would not follow the traditional rules in evaluating motions to dismiss in such cases. An argument that the court of appeals merely erred in applying the law does not normally make a case worthy of certiorari. Sup. Ct. R. 10.

B. The Ninth Circuit Did Not Impose a Heightened Pleading Standard.

Cholla argues that in rejecting its claim, the Ninth Circuit imposed a heightened pleading standard. Pet. at 16-17. It did not.

Courts may not require plaintiffs to go beyond the pleading requirements of Civil Rule 8(a) and allege in their complaints sufficient facts to establish a prima-facie case. *See Swierkiewicz*, 534 U.S. at 511 ("This Court has never indicated that the requirements for establishing a prima facie case . . . also apply to the pleading standard that plaintiffs must satisfy in order to survive a motion to dismiss."). But the Ninth Circuit did not do so here. The court did not affirm the dismissal because there were facts missing from the First Amended Complaint that would have been necessary to establish a prima-facie case. Instead, it analyzed the facts that Cholla alleged in the First Amended Complaint and concluded as a matter of law that Cholla had not stated a claim under the Establishment Clause. Pet. App. 8-13. If courts could not evaluate the facts as alleged by the plaintiff – as the lower courts did here – then dismissals for failure to state a claim would become a thing of the past.

C. The Ninth Circuit Did Not Improperly Discredit Cholla's Allegations or Go Outside the Record.

The whole basis for Cholla's argument that the Ninth Circuit went outside the record is mistaken. The gist of this argument is that the Ninth Circuit ignored Cholla's allegation "that the sole reason for" ADOT's decision not to purchase materials extracted from Woodruff Butte "was

that Cholla's land is sacred to the Tribes." Pet. at 20 (citing Pet. App. 68.) It asserts that the Ninth Circuit's contrary conclusion – that ADOT had a secular purpose for its decision – is outside the confines of the pleading, having been "based on what Respondents argued in their Motion to Dismiss." *Id.* This argument ignores an important part of Cholla's own pleading.

The First Amended Complaint itself established that Woodruff Butte's historic and cultural importance goes beyond its religious significance to the Tribes. That pleading quoted the SHPO's finding that the butte's prominence derives from several sources. In a 1997 letter to Cholla, the SHPO stated that the butte was eligible for listing with the National Register of Historic Places

> as a Traditional Cultural Property important in the history, cultural and religious practices and beliefs of at least three Native American tribes. . . . The property was eligible . . . primarily because of its association with the migration and creation histories of the tribes . . . the cultural practices of the tribes . . . and the association with important deities in Hopi, Zuni and Navajo religion. The Butte is an important cultural landmark for the tribes and has been a place of extreme importance in medicinal plant collection and religious practices for centuries.

Pet. App. 66, ¶ 78 (Cholla's emphases removed). The Ninth Circuit properly considered the SHPO's finding because it was a factual allegation contained in the pleading. *See Oakley v. Louisville & Nashville R. Co.*, 338 U.S. 278, 280 (1949) (the Court analyzes a motion to dismiss based on the facts pleaded in the complaint). Thus, the SHPO finding – which Cholla set forth in the First Amended

Complaint – clearly contradicts Cholla's allegation that ADOT decided not to participate in destroying Woodruff Butte solely on religious grounds. Pet. App. 67-69. The Ninth Circuit properly rejected this inconsistent allegation: a court is not bound by legal conclusions cast as factual allegations. *See Papasan v. Allain*, 478 U.S. 265, 286 (1986); *Clegg v. Cult Awareness Network*, 18 F.3d 752, 754-55 (9th Cir. 1994). It was not required to accept allegations as true if they were merely conclusory, unwarranted deductions of fact, or unreasonable inferences contradicted by the facts alleged. *Sprewell v. Golden State Warriors*, 266 F.3d 979, 988 (9th Cir. 2001). In sum, the record fully supported the Ninth Circuit's decision.

CONCLUSION

The Court should deny the Petition for Writ of Certiorari.

Respectfully submitted,

TERRY GODDARD
Arizona Attorney General

DANIEL P. SCHAACK*
JOE ACOSTA, JR.
CARRIE J. BRENNAN
Assistant Attorneys General
OFFICE OF THE ATTORNEY GENERAL
1275 W. Washington
Phoenix, Arizona 85007
(602) 542-7659
Attorneys for Respondents

**Counsel of Record*

(3)

Supreme Court, U.S.
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No. 04-952

In The Supreme Court of the United States

CHOLLA READY MIX, INC.,

Petitioner,

v.

VICTOR MENDEZ, Secretary of the Arizona Department of Transportation (ADOT); JEFF SWAN, ADOT Holbrook District Engineer; WILLIAM BELT, ADOT Environmental Planning Services Department; THOR ANDERSON, ADOT Official; RICHARD DUARTE, ADOT Environmental Planning Section Manager; BETTINA ROSENBERG, ADOT Historic Preservation Coordinator; JAMES GARRISON, Arizona State Historic Preservation Officer; and ROBERT GASSER, Arizona Parks Department Compliance Officer,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

REPLY BRIEF OF PETITIONER

WILLIAM PERRY PENDLEY*
**Counsel of Record*
CHRISTOPHER T. MASSEY
MOUNTAIN STATES LEGAL FOUNDATION
2596 South Lewis Way
Lakewood, Colorado 80227
(303) 292-2021
Attorneys for Petitioner

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTIONS PRESENTED

1. Whether a decision by state officials to bar a landowner from using his private property because some American Indians assert that the land is "sacred" violates the Establishment Clause notwithstanding claims by state officials that the "sacredness" of the land is historically and culturally important to those Indians?

2. Whether a complaint alleging an Establishment Clause violation, which satisfies notice pleading, may be dismissed for not alleging facts sufficient to establish a *prima facie* case under *Lemon v. Kurtzman*, 403 U.S. 602 (1971), given the holding of this Court in *Swierkiewicz v. Sorema*, 534 U.S. 506 (2002)?

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SUMMARY OF ARGUMENT

Arizona officials acknowledge that the Ninth Circuit's creation of a heightened pleading standard, to the level of proof of a *prima facie* Establishment Clause case, conflicts with the holdings of this Court and the Courts of Appeals. Resp. Br. 13. They contend, nonetheless, that the Ninth Circuit's ruling is not worthy of *certiorari*. Resp. Br. 4, 12. In so contending, however, Arizona officials ignore the radical break with and the gross damage done to this Court's Establishment Clause jurisprudence by the Ninth Circuit's published opinion. *See, Cholla Ready Mix, Inc. v. Mendez, et al.*, 382 F.3d 969 (9th Cir. 2004).

For, with *Cholla*, the Ninth Circuit has held that, because of the "unique status of Native American societies" and the historical and cultural importance that those societies ascribe to physical locations, including the land owned by Cholla, the Establishment Clause does not forbid barring Cholla from using its land because that land is "sacred" to some American Indians. Thus, for the 663,242,880 acres that lie within the states that comprise the Ninth Circuit, which land mass constitutes thirty-eight percent of the United States,[1] the Ninth Circuit has established binding precedent that allows state and federal officials to close public and private land to use because American Indians assert that it is "sacred" to them so long as those officials also maintain that the land is also "historically and culturally important" to those American Indians.

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[1] *Public Land Statistics 1992*, U.S. Department of the Interior, Bureau of Land Management, September 1993, Vol. 177, p. 5.

The Ninth Circuit's marked departure from and abandonment of this Court's and the Courts of Appeals' Establishment Clause jurisprudence, in response to a Rule 12(b)(6) motion to dismiss, merits this Court's review by granting Cholla's Petition.

ARGUMENT IN REPLY

I. THE NINTH CIRCUIT'S HEIGHTENED PLEADING STANDARD FOR ESTABLISHMENT CLAUSE CLAIMS CONFLICTS WITH THE HOLDINGS OF THIS COURT AND THE COURTS OF APPEALS.

This Court has never held that the requirements for establishing a *prima facie* Establishment Clause violation under *Lemon v. Kurtzman*, 403 U.S. 602 (1971), also apply to the pleading standard that plaintiffs must satisfy to survive a Rule 12(b)(6) motion to dismiss. Although Arizona officials concede that courts may not require plaintiffs to go beyond the pleading requirements of Rule 8(a)(2), they argue that the Ninth Circuit did not affirm the dismissal of Cholla's Complaint because Cholla failed to plead facts necessary to establish a *prima facie* case. Resp. Br. 13. Yet, that is precisely what the Ninth Circuit demanded of Cholla: "Cholla has alleged *no facts* that would support a conclusion that [Arizona officials] were not motivated at least in part by [a] secular purpose[,]" App. 9 (emphasis added); "[t]here is *no suggestion* that [Arizona officials] favor tribal religion over other religions or that they would not protect sites of historical, cultural, and religious importance to other groups[,]" App. 11 (emphasis added); "Cholla has *not alleged facts* that would support an inference that [Arizona officials'] actions foster excessive government entanglement with religion[,]" App.

12 (emphasis added); and "Cholla *does not allege* that [Arizona officials] participate in the Tribe's religious practices, inquire about the substance of their religious views, or monitor their religious practices." App. 13 (emphasis added).

The Ninth Circuit's holding conflicts with this Court's holdings, which provide that a complaint must include only "a short and plain statement of the claim[:] showing that the pleader is entitled to relief," *Swierkiewicz v. Sorema*, 534 U.S. 506, 512 (2002), and putting the defendant on notice of the nature of the claim, *Conley v. Gibson*, 355 U.S. 41, 47 (1957). In fact, this Court has rejected consistently use of a heightened pleading standard. *See, Swierkiewicz*, 534 U.S. at 512 (heightened pleading standards in employment discrimination cases conflict with Rule 8(a)(2)); *Conley*, 355 U.S. at 47 (a civil rights claimant need only set forth a short and plain statement of the claim sufficient to provide fair notice); *Scheuer v. Rhodes*, 416 U.S. 232, 236, 250 (1974) (remoteness of recovery in a civil rights action is not the test, rather, the pleader should be allowed to proceed through discovery and then summary judgment or trial); *Leatherman v. Tarrant County Narcotics Intelligence & Coordination Unit*, 507 U.S. 163, 168 (1993) (heightened pleading standards for civil rights plaintiffs are improper).

The Courts of Appeals are in accord and have held consistently in employment discrimination and civil rights cases, for example, that a heightened pleading standard may not be applied at the pleading stage to assess the adequacy of a complaint under the notice pleading requirements of Rule 8(a)(2). *See, e.g., Sparrow v. United Air Lines, Inc.*, 216 F.3d 1111, 1113 (D.C. Cir. 2000) (plaintiff did not have to make out a *prima facie* case of discrimination in his

complaint); *Weston v. Commonwealth of Pennsylvania*, 251 F.3d 420, 429 (3rd Cir. 2001) (denouncing any requirement for fact pleading and holding that "[d]iscrimination and other civil rights claims are clearly subject to notice pleading"); *Bennett v. Schmidt*, 153 F.3d 516, 518 (7th Cir. 1998) (complaint need not set out the elements of a *prima facie* case: "I was turned down for a job because of my race is all a complaint has to say"); *Ring v. First Interstate Mortgage, Inc.*, 984 F.2d 924, 926 (8th Cir. 1993) ("Under the Federal Rules of Civil Procedure, an evidentiary standard is not a proper measure of whether a complaint fails to state a claim").

Pursuant to the holdings of this Court and the Courts of Appeals, Cholla need only satisfy the notice pleading requirements of Rule 8(a)(2), which it did by alleging a violation of the Establishment Clause under each part of the *Lemon* test. App. 68-69; *Lemon*, 430 U.S. at 612-13. First, Cholla alleged that "[t]he purpose of [Arizona officials'] policy, the challenged regulations, and the denial of Cholla's application for a commercial source number is not secular[,]" but rather endorses the religion of the Hopi, Navajo, and Zuni Indian Tribes. App. 68. Second, Cholla alleged that "[t]he principle effect of [Arizona officials'] policy, the challenged regulations, and the denial of Cholla's application for a commercial source number is the advancement or protection of religion[,]" more specifically, the religion practiced by Hopi, Navajo, and Zuni Indian Tribes. App. 69. Third, Cholla alleged that "[Arizona officials'] policy, the challenged regulations, and the denial of Cholla's application for a commercial source number foster excessive government entanglement with [the] religion" of the Hopi, Navajo, and Zuni Indian Tribes. App. 69. Cholla further alleged specific harm as a result of the challenged regulations, Arizona officials' policy, and the

denial of Cholla's application for a commercial source number. App. 69. Finally, consistent with this Court's declaration that, "at a minimum, the Constitution guarantees that government may not coerce anyone to support or participate in religion or its exercise, or otherwise act in a way which 'establishes a religion or religious faith, or tends to do so,'" *Lee v. Weisman*, 505 U.S. 577, 587 (1992) (quoting *Lynch v. Donnelly*, 465 U.S. 668, 678 (1984)), Cholla alleged that Arizona officials coerced Cholla to recognize and support the religion and beliefs of the Hopi, Navajo, and Zuni Indian tribes through the implementation of the challenged regulations, Arizona officials' policy, and the denial of Cholla's application for a commercial source number.

Nonetheless, instead of adhering to the holdings of this Court, the Ninth Circuit demanded that Cholla provide "facts" to demonstrate, for example, that Arizona officials were not motivated by a secular purpose, App. 9, "facts" to demonstrate that Arizona officials preferred American Indian religion over other religions, App. 11, and "facts" to demonstrate that all of the elements of the *Lemon* test had been met, App. 12-13. It is expressly because these "facts," necessary to establish a *prima facie* Establishment Clause claim, were missing from Cholla's Complaint that the Ninth Circuit affirmed the dismissal of Cholla's claim. *See,* App. 15.

Accordingly, the Ninth Circuit's decision conflicts with the decisions of this Court and the Courts of Appeals. Moreover, the Ninth Circuit's holding "so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's supervisory power." Sup. Ct. R. 10(a). Therefore, Cholla's Petition should be granted.

II. THE NINTH CIRCUIT'S RULING CREATES AN ESTABLISHMENT CLAUSE TEST UNIQUE TO AMERICAN INDIAN RELIGION THAT CONFLICTS WITH THE HOLDINGS OF THIS COURT AND THE COURTS OF APPEALS.

In dismissing Cholla's Complaint, the Ninth Circuit held that Cholla's allegations were "premised on flawed analysis of governing law" as to what constitutes a violation of the Establishment Clause. App. 8. Thereupon, the Ninth Circuit set forth its unique view of the "governing law" when an individual alleges that government action regarding American Indian religion violates the Establishment Clause. App. 8-13.

In the Ninth Circuit's view, which conflicts with the holdings of this Court and the Courts of Appeals, the "unique status of Native American societies" and that they regard "sacred" lands to be "historically and culturally important" render any governmental closure of public or private land purportedly "sacred" to them immune from an Establishment Clause challenge.[2] App. 9-10. More specifically, the Ninth Circuit held:

> In conclusion, the Establishment Clause does not bar the government from protecting an historically and culturally important site simply because the

[2] The Ninth Circuit's view of the unique status of American Indian religion creates a clear conflict. *See, Lyng v. Northwest Indian Cemetery Protective Ass'n*, 485 U.S. 439, 451-52 (1988) (demands for privacy in a National Forest considered sacred by American Indians cannot justify the government's closure of public lands, even temporarily); *see also, Badoni v. Higginson*, 638 F.2d 172, 179 (10th Cir. 1980) ("Issuance of regulations to exclude tourists completely . . . for the [] purpose of aiding [American Indians'] conduct of religious ceremonies would seem a clear violation of the Establishment Clause").

> site's importance derives at least in part from its sacredness to certain groups.

App. 13. Likewise, Arizona officials argue, without evidence, that their challenged regulations and policy have an "obvious" and "unmistakably" secular purpose because they barred any use of Cholla's land, not only because of its religious significance, but also because of its historical and cultural importance to American Indians.[3] Resp. Br. 5-6.

This Court's Establishment Clause analysis asks whether government has "demonstrate[d] a preference for one particular sect or creed [ ]" that may reasonably be perceived as government endorsement of religion, *Allegheny County v. Greater Pittsburgh ACLU*, 492 U.S. 573, 605 (1989); *see also, Lynch*, 465 U.S. at 687 (O'Connor, J., concurring), because the Establishment Clause "prohibits government from appearing to take a position on questions of religious belief. . . ." *Allegheny County*, 492 U.S. at 593-94. This analysis applies even when the religious symbols

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[3] In *ACLU of KY, et al. v. McCreary County, et al.*, now before this Court, plaintiffs were allowed to present evidence that the sole reason for placing the Ten Commandments in the courthouse was a religious one, notwithstanding McCreary County's claim that the display was of historical or cultural importance to its citizens. *McCreary County*, 354 F.3d at 458-62. Here, the Ninth Circuit dismissed Cholla's Complaint without allowing Cholla the opportunity to present evidence. Although Cholla's Complaint alleges that Cholla was barred from using its land solely because of the land's religious significance to American Indians, its Complaint was dismissed either because Arizona officials' attorneys argued, without evidence, in their motion to dismiss that Arizona officials barred use of Cholla's land because it is "historically and culturally important" to American Indians, or because, under the Ninth Circuit's unique view of the "governing law," any Establishment Clause challenge to the endorsement of American Indian religious symbols fails if the officials claim that the symbols are "historically and culturally important" to those American Indians. Both bases are in conflict with the holdings of this Court and the Courts of Appeals.

in question have historical and cultural attributes. However, under the Ninth Circuit's unique test here, which applies only to American Indian religion, the mere existence of such historical and cultural attributes saves government endorsed American Indian religious symbols from Establishment Clause scrutiny.

For example, in *Allegheny County*, this Court held that a crèche, which was topped with an angel bearing a banner proclaiming "Gloria in Excelsis Deo!", violated the Establishment Clause because the display could be seen as a government endorsement of Christmas "as a Christian holy day." *Id.* at 601. Thus, despite the crèche's "historical" and "cultural" significance in the Christian religion, its display by Allegheny County was unconstitutional. *Id.* at 598. In conflict with *Allegheny County*, the Ninth Circuit held, as to American Indian religion, that the "historical[] and cultural[] importan[ce]" to American Indians of an American Indian religious symbol endorsed by government bars any challenge to that endorsement under the Establishment Clause. App. 13.

That the Ninth Circuit's use of the historical and cultural attributes of religious symbols is unique to American Indian religion is clear from two related Ninth Circuit rulings with regard to Christian religious symbols, one issued only weeks before the Ninth Circuit's ruling in *Cholla*. *See, Buono v. Norton*, 371 F.3d 543 (9th Cir. 2004) (presence of cross designated as a World War I memorial in a national preserve violated the Establishment Clause);[4] *Separation of Church and State Committee v. City of Eugene*, 93 F.3d 617 (9th Cir. 1996) (Latin cross in a city

[4] *Buono* was decided on June 7, 2004; *Cholla* was decided on September 1, 2004.

park erected in 1964 that was a memorial in honor of war veterans violated Establishment Clause). In both *Buono* and *Separation of Church and State Committee*, the Ninth Circuit held that, despite the "historical" and "cultural" significance of the symbols as war memorials, the display of these symbols violated the Establishment Clause under *Lemon* and *Allegheny*. *See, Buono*, 371 F.3d at 550; *Separation of Church and State Committee*, 93 F.3d at 619-20.

The Courts of Appeals agree. *See, Kaplan v. City of Burlington*, 891 F.2d 1024 (2nd Cir. 1989), *cert. denied*, 496 U.S. 926 (1990) (display of a menorah in a city park violated Establishment Clause despite "cultural" significance to the community); *ACLU of KY, et al. v. McCreary County, et al.*, 354 F.3d 438 (6th Cir. 2003), *cert. granted*, 125 S.Ct. 346 (2004) (display of Ten Commandments was unconstitutional despite its "historical" importance); *Harris v. City of Zion, Lake County, IL*, 927 F.2d 1401 (7th Cir. 1991), *cert. denied*, *City of Rolling Meadows v. Kuhn*, 505 U.S. 1244 (1992) (presence of religious symbols on city seal represent unconstitutional endorsement of Christianity regardless of the seal's "historical" significance).

Moreover, as is clear from Part I above, the Ninth Circuit reached its unique holding, which it published, in response to a Rule 12(b)(6) motion to dismiss. App. 1-15. Thus, the Ninth Circuit's conclusion – that Arizona officials' ban on the use of Cholla's land due to its religious significance to American Indians was not unconstitutional because Cholla's land was also "historically and culturally important" to American Indians – was based, not upon facts found by the District Court or even answers filed in response to Cholla's Complaint, but upon arguments made by Arizona officials' attorneys in their motion to dismiss. State Defendants' Motion to Dismiss at 10-13. Nonetheless,

the Ninth Circuit's holding in *Cholla* is now binding precedent for nine states whose vast land mass comprises thirty-eight percent of the United States. For state and federal land users and private land owners within those states, state and federal officials may close public and private land to use because those lands are considered "sacred" to American Indians. Those closures may occur without fear of scrutiny under the Establishment Clause so long as those state and federal officials assert, and those American Indians claim, that the lands are of "historical" and "cultural" importance to those American Indians.

Accordingly, the Ninth Circuit's unique view of the "governing law" when an individual alleges that government action regarding American Indian religion violates the Establishment Clause conflicts with the holdings of this Court and Courts of Appeals. This Court should grant Cholla's Petition to resolve this conflict.

CONCLUSION

For the foregoing reasons, Cholla Ready Mix, Inc., respectfully requests that this Court grant its Petition.

Respectfully submitted,

WILLIAM PERRY PENDLEY, ESQ.*
**Counsel of Record*
CHRISTOPHER T. MASSEY, ESQ.
MOUNTAIN STATES LEGAL FOUNDATION
2596 South Lewis Way
Lakewood, Colorado 80227
(303) 292-2021

Attorneys for Petitioner

Dated: March 29, 2005.